United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

77-7018

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In the

United States Court of Appeals

For the Second Circuit

J. Gordon Edwards, Ph.D., Thomas H. Jukes, Ph.D.,
Robert H. White-Stevens, Ph.D.,
Plaintiffs-Appellees,

—against—

National Audubon Society, Inc., Robert S. Arbib, Jr., Elvis J. Stahr, Jr.,
Defendants,

The New York Times Company and Roland C. Clement,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

JOINT APPENDIX
(Volume II—Pages 1-664)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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J. GORDON EDWARDS,
THOMAS H. JUKES, and
ROBERT H. WHITE-STEVENS,

Plaintiffs,

-against- : 73 Civ. 3153

THE NATIONAL AUDUBON SOCIETY, INC.,
and THE NEW YORK TIMES, INC.,

Defendants.

-- x

Before:

HON. CHARLES M. METZNER,
District Judge

New York, June 3, 1976
Room 1105 -

APPEARANCES

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CHARLES L. TROWBRIDGE, Esq.,
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Attorneys for Defendant National Audubon Society

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(In open court.)

THE COURT: Good morning.

THE CLERK: J. Gordon Edwards, Thomas H. Jukes, and Robert H. White-Stevens v. The National Audubon Society, Inc., and The New York Times, Inc.

Are the plaintiffs ready?

MR.ROTHWELL: The plaintiffs are ready, your Honor.

THE CLERK: Is the defendant The New York Times ready?

MR. ABRAMS: Defendant The New York Times is ready.

THE CLERK: Is the defendant Audubon Society ready?

MR. AGOGLIA: Ready.

THE COURT: Before we proceed with impanelling a jury I think there are some preliminary matters that have to be disposed of. On October 31, 1974, this case was sent to Magistrate Hartenstine to supervise the pretrial discovery and the forming of a pretrial order. That pretrial order was finally due on Friday, May 21st, but did not arrive in my chambers until Wednesday afternoon, May 26th.

In going over the pretrial order it is obviously not a pretrial order framing the issues, since in effect it merely gives the contentions of each side as to what the issues should be. In addition, the plaintiff has set forth in his list of issues evidentiary material which are not properlyin the framing of issues.

Consequently, I will accept a pretrial order except for paragraphs 2 and 7. I will strike the first sentence of paragraph 2, and paragraph 7 is stricken. In place thereof I rule that this case is concerned solely with three publications: The article appearing in American Birds, which was circulated some time in the beginning of July, 1972, for which recovery is sought against The Audubon Society and the three individual defendants; the article appearing in The New York Times on August 14, 1972 for which recovery is sought against The New York Times, The Audubon Society and the three individual defendants; and the letter sent on the letterhead of The Audubon Society dated August 14, 1972 to The New York Times for which recovery is sought againt The Audubon Society and the three individual defendants.

Since this matter has been pending for over three years and before a Magistrate for pretrial proceedings for over a year and a half I will not permit amendments set forth inthe pretrial order by the plaintiff at this late date. The issues in this case are: Does the article in American Birds refer to the plaintiffs; second, are the statements in the three publications libelous per se, and I hold that they are under New York law; three, are the statements false; four, were they published with actual malice under the rules set forth in New York Times v. Sullivan.

If the above issues of liability are resolved in favor of the plaintiff against any of the defendants the remaining issues are: One, the amount of compensatory damages, and the amount of punitive damages. I hold as a matter of law that punitive damages would be recoverable if the jury found in favor of the plaintiff on this issue of liability.

I do not agree with the holding in the Mayhew case, 3384 F. Sup. 166.

Now, the plaintiffs sent a letter to the Court, dated last Friday which, of course, was not received here until after the holiday on Tuesday, requesting permissio to call John Devlin as an adverse witness. I see no objection to this unless counsel for The Times wishes to note his objection.

MR. ABRAMS: We have no objection, your Honor, and Mr. Devlin is here.

THE COURT: All right. Plaintiffs' counsel also advise the Court that it will move to amend the complaint to conform to the proofs. The Court does not have to be advised of such move, although I must admit that counsel having lived with the case for three years and spent a year and a half in pre-trying it should know what his issues are and what the evidence will be to support those issues. But, we will rule upon any application that may be made at the end of the case.

Finally, the letter agrees to the necessity of a preliminary hearing on the issue of qualified privilege and goes on to state that its counsel plans to serve and file motion papers, including an affidavit and memorandum of law, to bring this matter on for the Court's formal disposition and ruling at a time of the Court's choosing.

Well, this letter was only received Tuesday. I don't see how you possibly could have served motion papers, affidavits, briefs and have me require the other side to reply to them and within 48 hours have a hearing. But, I really don't know what you were talking about when you asked for that.

I am prepared to proceed with the impanelling of the jury now.

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There is one last question, that is this question of qualified privilege. I have come to the conclusion that after reading Reynolds v. Pegler and New York Times v. Sullivan that there is no defense of qualified privilege as a result of the rule set forth in Times v. Sullivan.

Reynolds v. Pegler sets forth the procedures that should be followed in case the defense of qualified privilege exists. It states that there should be a preliminary hearing by the Court to find out whether the material published in effect is pertinent to statements previously made by the plaintiff. And if the Court finds pertinency it then leaves to the jury the issue of good faith.

Now, how can there be an issue of good faith if the plaintiffs have to prove actual malice? Consequently I rule that there is no defense of qualified privilege in this case.

If the plaintiff is successful in proving actual malice, the qualified privilege cannot defeat that recovery. Consequently I am prepared to impanel a jury unless anybody else wishes to raise something new.

I will not hear argument on my rulings. I have read your papers and the rulings have been made. Is there anything else that counsel wishes to bring up before I call for the jury?

MR. ROTHWELL: Yes, your Honor. Two matters. May I introduce my colleague, Mr. Henry Cappello, who is a member of the Bar of Virginia and of Washington, D.C., and will provide some assistance in this matter.

May I move his admission for the purposes of this case.

THE COURT: Application is granted.

MR. ROTHWELL: Thank you, your Honor.

And also I do want to offer a word of explanation and apology to the Court in reference to the subject matter of the proposed motion and affidavit.

It turned out with the intervening holiday that that wasn't possible, and I have served on opposing counsel and with the Court something --

THE COURT: I might as well point out to you the acoustics are terrible in this courtroom so you are going to have to keep your voices up. Sometimes if you keep your voices up it gets worse because it reverberates. But do the best you can.

MR. ROTHWELL: I say that -- and I am sorry, Mr. Agoglia --

THE COURT: Turn around. I don't mind if you face counsel also.

MR. ROTHWELL: The matter relating to the subject of qualified privilege, your Honor, makes moot the Court's ruling in reference to that; makes moot this last paragraph of my letter to the Court and copies to counsel, of last week.

THE COURT: All right. Mr. Abrams, do you have anything else?

MR. ABRAMS: I will raise one matter, your Honor, which you may prefer I do later and we revised it yesterday, the subject matter of the testimony of the expert witnesses who are intended to be called by the plaintiffs.

At least as to one of those witnesses Mr. Buchanan, we think that the subject matter is so evidently improper that we are going to urge on you either now or later, if you prefer --

THE COURT: Why don't we do it now? Otherwise we will have to go into chambers and the jury will be sitting here.

MR. AGOGLIA: May I join in the application as well, your Honor?

THE COURT: Yes. Mr. Trowbridge?

MR. TROWBRIDGE: That's Mr. Agoglia. I am

Mr. Trowbridge.

THE COURT: Who is going to try the case?

MR. TROWBRIDGE: Mr. Agoglia, your Honor.

THE COURT: All right; yes, Mr. Abrams?

MR. ABRAMS: We were advised yesterday that Mr. Buchanan will testify as an expert witness for the plaintiff with respect to the norms of scientific methods, the role of debate and controversy and the conventional parameters thereof, and counsel has also advised usthat Mr. Buchanan will testify to the effect of the language used in the articles in question on a scientist.

We are particularly concerned about any testimony as to the effect of the language used on a scientist. For one thing there is New York case law which is, we believe, directly on point which says that opinions of third persons as to the gravity of a libel is not the proper subject for expert testimony.

Second, we don't think that the whole thing is a proper subject for expert testimony. We think the jury can hear, your Honor has already ruled, that it is libelous per se in any event and there is no need for Mr. Buchanan to testify at all and no proper contribution that he can make.

MR. AGOGLIA: May I be heard a moment?

THE COURT: Yes.

MR. AGOGLIA: If your Honor please, I would respectfully suggest to the Court that it would be totally improper for any expert or alleged expert to claim that he will offer testimony concerning the norms of scientific methods.

I don't believe that there is any such norm in existence in the world because it varies with every scientist. And therefore, it is not a matter of expert testimony.

THE COURT: Well, let's ask Mr. Rothwell to explain what he means by "norms of scientific methods." It leaves me a little confused.

MR. ROTHWELL: Yes, your Honor. A lay jury will not understand full well that our clients who have devoted their lives and careers to university work and laboratory work at this stage of their lives, all they have in essence is their reputations for integrity and in terms of a scientist he is as vulnerable to that charge relating to that as any of the counsel in this court would be.

And that this is something that is not self-evident to a jury and I think we are entitled to hear Dr.

Buchanan of the Massachusetts Institute of Technology on the issue of damages.

What does this do to a scientist? What does this do in terms of his ability to get grants? His ability to get awards.

Additionally and up until this point the controversy in this case has been of course, as the Court is thoroughly familiar with the summary judgment material that went on here up to and including last month, we are now faced with the prospect of having a protracted examination of those plaintiffs on cross in reference to all of their published works and this is either going to terribly confuse the jury, or terribly compound the issues in the case, because I regret very much to put my clients in the position where they have to in effect defend themselves in this courtroom.

And it was the thinking of plaintiffs' counsel that to have an eminent academician speak to the jury in reference to who scientists and university professors are, what their special vulnerabilities are, how they are presumed to behave in terms of their exchanges of discourse and the norms of scientific method.

I am sorry that the phraseology doesn't please my eminent opponents here, but I think it would be of aid and assistance to the jury, your Honor.

THE COURT: First of all, I don't see how all this controversy is coming in since I have ruled out qualified privilege.

The issue here is whether the statement was a libel. And the statement, as I understand it is, or rather the claimed libel is that Audubon and The Times in their articles said that the plaintiffs lied about citingAudubon's bird count as an indication of an increase in the number of birds in support of their argument. That DDT is not harmful.

Audubon answers by saying that the truth is that the population is not increasing, but there are more and better bird counters. And that you have told this to the scientists, but despite having told them that this is not valid data to be used, the Audubon Society came back and said any time you hear a scientist say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about.

That's the only issue in this case. I see nothing about their past controversy on DDT that enters into this case at all.

Yes, Mr. Agoglia.

MR. AGOGLIA: May I be heard a moment, your

Honor?

THE COURT: Yes.

MR. AGOGLIA: Your Honor, in order to fit within andestablish that there was in fact a heated controversy which I think all sides have agreed in the pre-trial order existed at the time, which would give us certain privileges and rights under the First Amendment of the Constitution --

THE COURT: I do not take the heated controversy. Your rights under the First Amendment are there limited by Times v. Sullivan, period. The existence of a heated controversy does not make the least bit of difference.

MR. AGOGLIA: Well, I respectfully suggest to the Court --

THE COURT: And I will not allow any evidence in on it. Whether there is a heated controversy or not. Plaintiffs have to prove that what you said was done with actual malice, that's the issue in this case.

And what you said here is that any time I hear a scientist say the opposite you are in the presence of someone who is lying.

And the opposite is that the bird count shows an increase inpopulation and therefore DDT is not harmful.

Is it true or false? That is all. And did you say it with actual malice? I do not care about DDT and the controversy and I am not going to deluge this jury with this mass of prior information on the heated controversy.

MR. AGOGLIA: If your Honor please --

THE COURT: Not under the rule of Times v. Sullivan.

MR. AGOGLIA: May I further be heard, your Honor? I think it certainly is relevant on two other grounds.

Number one, the ground of provocation and number two, the grounds of damages. I have a right -- you see, your Honor --

THE COURT: What provocation?

MR. AGOGLIA: The character and --

THE COURT: What provocation?

MR. AGOGLIA: That they had called us for example, in the past with things that were far more outrageous than --

THE COURT: That's not in this case.

MR. TROWBRIDGE: Your Honor, the provocation, sir, is --

THE COURT: Now, wait a second. I want one lawyer ona sidenot two.

Now you can decide between yourselves which one is trying this case.

Mr. Abrams, while they are talking, I will listen to you.

MR. ABRAMS: One thing. It seems to me it also goes to damages, your Honor. If these plaintiffs have previously had harsh things said about them, certainly if there is any liability on either side of their table that liability is limited to the libel in question, and if for example, the Audubon Society responding to earlier things that these plaintiffs may have said about the Audubon Society has earlier said harsh things about them, surely we cannot be liable for that.

And -- let me put it concretely. Suppose they could show --

THE COURT: Tell me who the "they" are.

MR. ABRAMS: Suppose for the moment plaintiffs were ableto demonstrate to the jury that they were not getting grants or they had lost salary or something of that sort, ordinary damages.

I should think it would be relevant to that for us to be able to argue to a jury that they did not lose it because of the alleged New York Times libel but because of a controversy which has been going on for ten years in which they have had things said about them and they have said things about others, all of which bear upon whatever has happened to them.

MR. AGOGLIA: Your Honor, I further submit that --

THE COURT: That is awfully vague. Go ahead, I will listen to you.

MR. AGOGLIA: Your Honor, I think it is further highly probative on the issue of character and reputation of the plaintiffs which cannot be taken from the jury certainly on the issue of damages.

And if they were people who were used to using invectives of all sorts and types, that goes to the question of their professional standing and/or damages in the case.

Ergo, this evidence should be admissible certainly on that ground alone.

THE COURT: I have heard some great experts of great renown using invectives.

MR. AGOGLIA: But it is a jury question, your Honor.

THE COURT: It did not detract from their standing in the community, one iota.

MR. AGOGLIA: But playing to the question of damages, that's a jury question, sir.

THE COURT: Did you ever hear of Moses Hatus?

MR. AGOGLIA: I regret to --

THE COURT: One of the great humanists in this country who died a couple of years ago, was a professor at Columbia. Invective came out of his mouth every other word. Did not detract from his general reputation, and high reputation in the academic world because he used invective.

MR. AGOGLIA: That's one man's opinion, your Honor. It might is all I am saying, it's a jury question is what I am trying to suggest to the Court.

In your humble opinion --

THE COURT: Not in my humble opinion. In the opinion of those in the area having listened to him for forty years still thought he was the greatest man around.

MR. AGOGLIA: But there might have been some around, your Honor,who didn't and I submit that is a question the jury should pass on.

MR. ABRAMS: Let me get to some of the concrete examples.

Among the passages we would intend to read to the plaintiffs on cross examination are documents that they had written accusing others of being quacks and witchdoctors and defacto murderers and people who wished to commit genocide.

I would urge upon you that perhaps the word "liar" even if everything else is proved against us, simply does not mean as much in a context in which the participants in that extraordinary heated debate were using that kind of language one as against the other.

And if we can't urge that upon the jury, I think we will be really deprived of something that the jury has to know to be able to understand what "liar" means.

THE COURT: You mean who the person is who is being called a liar?

MR. ABRAMS: No.

THE COURT: Well, isn't that what you are saying reversely?

MR. ABRAMS: I am saying how much does it mean to this particular scientist to be called a liar when he has had five things said about him which are pretty rough in the past and he has said extraordinarily rough andquite similar things.

One of the people, one of the plaintiffs in this case used the word liar so routinely that it dwarfs anything The New York Times printed.

THE COURT: You make two points now, Mr. Abrams. Other people calling him things are immaterial in this case, are they not, if other people have libeled him that don't --

MR. ABRAMS: They bear upon damages and the state of his reputation, do they not?

THE COURT: Because if other people called him a liar and he is not a liar, therefore, he gets less money than he would have if only one person called him a liar?

MR. ABRAMS: If those people, what they said are the proximate cause of the harm to many and not what my client said, then damages, if any, are going to be --

THE COURT: How are you going -- that is quite speculative, isn't it? If the San Diego Times had called him a liar you say you can come into this courtroom and in your defense say the San Diego Times called him a liar therefore -- and then you are assuming it is true by the way that he is a liar -- therefore, it reduces his compensation in this courtroom? I hold that is not true.

MR. ABRAMS: What I was saying is that the plaintiffs cannot come into this courtroom and say that because The New York Times prints an accusation against him by others that they are a liar, that we are bound by that as if no one had ever attacked their reputation in the past, and as if therefore they come into the courtroom pristine and pure with a reputation which is unblemished asif no one had ever said these things.

THE COURT: Well, I do not think it makes any difference, because I am not going to try in this lawsuit whether they were libeled by the San Diego Times.

MR. ABRAMS: Absolutely, your Honor, but when it comes to damages at least I should think it would be the plaintiffs' burden to show that the libel they allege isthe proximate cause of their harm.

And I should think I would be entitled to respond to that by saying we don't know that that is true.

A lot of people said a lot of things in this controversy, which may or may not have damaged them, but I assure you I am not going to try to prove that the San Diego Times, if they said that, were the cause of the harm, but I think plaintiff cannot come in here and act as if no one has ever said this about them and then point to whatever compensatory harm they will allege and that I should be deprived of the opportunity to --

THE COURT: Well, supposing other people called them liars and you want to bring out on cross that other people called them liars, but are they entitled to come back and say but they are guilty of libel also, they defamed me the same as you defamed me? Don't I get into that area at that point?

MR. ABRAMS: Well, they can say that but I think that they have a burden on damages to show --

THE COURT: I understand that, but isn't there a limit on which the cross examination goes?

MR. ABRAMS: There is a limit. I don't think this passes beyond it because it seems to me so central to the question of damages, and if I may say so I think --

THE COURT: Supposing that all the other issues -- pardon me, all the other examples that you raise, if they had been sued upon the plaintiffs would have recovered judgments against everybody they sued --

MR. ABRAMS: Right.

THE COURT: -- but they have not reached the stage of suing them yet. You say that I can rely on that in this case to reduce your damages here even though it may be that what I am relying on is a libel. Published with actual malice.

MR.ABRAMS: I am saying that a jury can take into account and should it --

THE COURT: You give me some authority on that.

MR. ABRAMS: I will try. May I just say one more thing because really it is more the center of why I think this is relevant than any other -- I would like to come back tothe example I used.

We are prepared to submit evidence that one of the plaintiffs has frequently used the word "liar" in reference to other people including the Audubon Society.

THE COURT: I think I would let you do that. That is why I said before you were making two arguments and I was addressing myself to the second one.

MR. ABRAMS: Yes, I was coming back to the second now.

THE COURT: You had come back to the first.

MR. ABRAMS: I was coming back to the first which I like more and which I would recommend to you.

THE COURT: I think there is more basis for that. What do you say on that, Mr. Rothwell?

MR. ROTHWELL: This is very interesting, your Honor. We started out by talking as to whether or not Mr. Buchanan could testify in reference to what would essentially be character testimony and behavior testimony, reputation testimony.

And of course the objections is my colleagues have done a far better job of demonstrating to the Court plaintiffs'concerns in this matter and we most emphatically do not want thisto be turned into a test of the plaintiffs' character and reputation on the grounds that they can dredge up.

Now, in addition --

THE COURT: How can you avoid that in a libel suit?

MR. ROTHWELL: This is exactly why, your Honor --

THE COURT: Otherwise, then Mr. Abrams is absolutely right. You come in here and say I am as clean as a new born baby even though I am a real bad guy and I want all the money in the world that I can get from The Times and the Audubon Society and three individual defendants on the basis that I am pristine, when in fact I am practically as bad as these defendants are except they made a mistake and I am going to prove actual malice.

MR. ROTHWELL: Well, your Honor, there is a qualified privilege of reply --

THE COURT: Not in this lawsuit.

You are going to have to prove actual malice, and if you prove actual malice there is no quashed privilege because that raises a question of good faith and good faith is no defense.

MR. ROTHWELL: The only way that testimony can come in from my clients on cross examination as to their prior assertions is limited by the parameters of the privilege which is the right of reply.

And it has to be contemporaneous, it has to be against the party charged of the libel in the underlying case, and certainly I think there is nothing that Mr. Abrams is going to be able to show that any of my people ever said about The New York Times. They have engaged in disputes with others.

Are we going to let Mr. Abrams and his client, The New York Times has not been criticized or castigated by my people, are we going to let Mr. Abrams take the language that my clients have used in reference to -- maybe in their debates in their scientific halls and their exchange of correspondence, in their letters to the editor sort of thing? Are we going to let him take that and use that as a protective cloak for the --

THE COURT: Maybe.

MR. ROTHWELL: This is really the question, your Honor. Are we going to --

THE COURT: I am afraid that I may have to do this on a bit by bit basis. I think I have indicated generally what my feeling is, and not completely.

You fellows have lived with this case as I say for three years and the mass of exhibits you have indicates that. I haven't seen them. I can merely ask that you use discretion in the beginning and if we have any disputes we will have to settle them at the bench.

It is obvious I cannot make it general here, I indicate to Mr. Abrams I will not allow your second point in unless you give me some authority.

All right. Should we send for the jury?

MR. ROTHWELL: Your Honor, I don't understand the rulingin reference to the expert witness that I have proposed.

THE COURT: Your expert witness will be your last witness. When we get to him we will decide --

MR. ROTHWELL: If the Court please, we have a severe scheduling problem.

THE COURT: I am sorry about that. I have a trial to conduct and I have to conduct it in an orderly fashion.

And the question of whether your expert can testify, I think will depend greatly on the testimony that comes in first.

MR. ROTHWELL: It would have been my hope to offer Mr. Buchanan to testify this morning.

THE COURT: Impossible. I will exclude him then. I cannot tell until I hear all the plaintiffs on direct and cross examination whether Dr. Buchanan's testimony comes in.

Otherwise I will sustain Mr. Abrams' objection. Because he has to be subject to cross examination on what comes out from cross examining the plaintiffs. And you are going to sendhim away and he will not be available to cross examination on what the plaintiffs say on their cross.

MR. ROTHWELL: Your Honor, I have no such stratagem in mind.

THE COURT: I do not mean you intended to do it that way. I am just saying if you put him on first he is not goingto be available later for cross examination based on what your clients may say on the witness stand, which may change his opinions. I do not see how you can possibly put an expert on until the plaintiffs have testified.

We will send for the jury. I gather there is an antagonistic defense in this case between -- is that so or not, Mr. Agoglia?

MR. AGOGLIA: Antagonistic?

THE COURT: Yes.

MR. AGOGLIA: I don't follow, sir.

THE COURT: Well, won't part of this case revolve on whether the jury believes Devlin or --

MR. AGOGLIA: It is our position, so the record is very clear, your Honor, I don't care who they believe;there is no libel here nor is there libel in the sense that there will be any evidence of actual malice.

As a matter of fact there will be no such evidence in the case. And that is our position.

But we do have a legitimate fact issue which your Honor very cleverly pointed out both at the bench today and in a prior decision of the Court,that there is a factual issue between these two men.

Now I follow what your Honor said and I say, yes.

THE COURT: Consequently, instead of three challenges -- instead of three between two of you, I will give each two, you can pool them according to how you see fit.

MR. AGOGLIA: Your Honor, I have four defendants.

THE COURT: You have got one defendant for challenging purposes. No conflict between your defendants.

MR. AGOGLIA: No, sir, I agree with that, but we are certainly not parties to represent a joint interest as such because as your Honor very cleverly pointed out there is a rather sharp actual distinction --

THE COURT: Therefore, instead of having three challenges which you normally would have for all defendants I am giving four.

MR. AGOGLIA: I get it. Thank you, your Honor.

THE COURT: You can have two, Mr. Abrams can have two or you can pool the four. I don't care how you do it. All right.

(Recess)

(A jury was duly impaneled and sworn)

THE COURT: You may proceed, Mr. Rothwell.

MR. ROTHWELL: Your Honor, may I ask the Court where it would be better for me to stand to address the jury?

THE COURT: Any place that is most convenient for you.

MR. ROTHWELL: In terms of the acoustics.

THE COURT: Why don't you stand right against this table and face the jury.

MR. ROTHWELL: Fine, thank you. And if there is anyone that can't hear me of my colleagues or adversaries, just tell me to speak up.

This part of the proceedings that open this activity is called the opening statement. I am counsel for the plaintiff. My name is Thomas Rothwell. And although the Court was courteous and considerate enough to introduce everyone at the start, that was a couple of hours ago, and we hada much larger group in the room. So permit me to introduce, if you will, my colleague, Mr. Berndtson andmy colleague, Mr. Cappello.

At this table, the first two gentlemen, Mr. Agoglia and Mr. Trowbridge who represent the National AudubonSociety and Mr. Scheiman and Mr. Abrams and Ms. McNaughton, who represent The New York Times.

And we are all going to be working together here for a few days and I have the opportunity of opening and telling you what this case is, what it is about.

The plaintiffs in this action are sitting over there in the front row on the right. You met them, they stood and you looked at them. They are three professors at universities. They are three PhD's, doctors of philosophy and they are three scientists each having some degree of eminence in a separate field of science.

We know and it is an open secret that this controversy sort of grew out of recently concluded controversy relating to the continued use of DDT. And DDT is not on trial here.

What is on trial is the reputation of my clients, three people, three reputations. This is a case for libel.

OnAugust 14, 1972, which day fell on a Monday, The New York Times carried an article that said, and you will see it, that certain prominent scientists were accused of lying.

Now, this case involves how that came to be. The names of these three plaintiffs, and two other names, were published that day in the August 14th edition of The New York Times. How did this come to be?

Looking into it as we will together, we will find that that article was written by a man also in this courtroom and who will be a witness telling us about it from the stand. A man by the name of John Devlin.

John Devlin is a reporter for The New York Times and has been such for many, many years. It came to his attention sometime in July of 1974 that an Audubon publication, a sort of special publication of Audubon called American Birds, reached his desk and he read it. And he became very curious.

That publication contained some charges and accusations about the Christmas bird count. That publication, incidentally, is an annual publication. In prior years it was published under another name. But it contains the data of the annual Christmas bird counts which are of great interest to certain people who are members of the Audubon Society and others who are, they call them ornithologists. And I had to look that up. That means bird-watchers or bird students or bird-fanciers. Ornithologists.

And so this book goes to ornithologists and Mr. Devlin reporting for The New York Times is a sort of amateur ornithologist and he read it. And he found in the forward, the sort of preliminary editorial, or editor's statement that precedes the compilation of data, he found some language that suggested that certain prominent scientist spokesmen in the pay of industry were being paid to lie about the interpretation of, or some aspects of the Audubon Christmas bird count.

That is what triggered Mr. Devlin's reportorial notices, if you will. He explored the matter.

He talked to the people at Audubon. He talked to -- after that he talked to two of these three plaintiffs. Now the curious thing about that foreword to Audubon is that no names were mentioned. However, Mr. Devlin, good reporter that he is, did get some names from the Audubon Society. He spoke to the editor of that magazine, or that publication, a gentleman by the name of Robert Arbib.

Mr. Arbib passed on the names and the story was written, the story was written with the names and the story was written with a headline as you shall see.

In his talk over the telephone with three of the five people, Mr. Devlin heard, if you will, the other side of the story. You will hear that from the witness stand.

He heard from the three people that he talked to who were by name Dr. White-Stevens, Dr. Jukes and a third gentleman who is not in this courtroom and not a party to this litigation by the name of Dr. Spencer.

So when Mr. Devlin wrote his article and when The New York Times published it, you will find in that article a sort of mention as to the conversations that Mr. Devlin had with those people.

In addition, we will have the benefit and privilege of hearing Mr. Devlin tell us about this himself. Now, Mr. Devlin is not involved as a defendant in this matter. The defendants are The New York Times, The National Audubon Society and three people who act as agents or principals for The National Audubon Society.

But John Devlin is not involved, he is not a defendant. However, we do plan to examine him at length and at the conclusion of his examination I think we all will have a better idea of what occurred, how this event came to pass.

Now, this opening statement is going tobe brief. And itis going to be very candid. I heard you stand in this court with your hands raised take an oath, and I believe that oath.

And I would like to take one for you. When we are all finished with this trial you check off: Has counsel forplaintiffs said one word to you that he couldn't prove? I promise you the answer to that question is no. That at the conclusion of this trial you will find that everything that I have said to you in these last few minutes is true, practically admitted, indisputable.

Now, I must confess to you that I have had trouble with this case. This has been a very difficult case --

MR. AGOGLIA: I have been rather patient listening to counsel's opening and I submit --

THE COURT: Just give us the facts you intend to prove not troubles you may have had with the case.

MR. ROTHWELL: Your Honor, I am sorry, I can't hear you.

THE COURT: I said, the purpose of an opening is to tell the jury the facts you are going to prove not the troubles you have had with the case.

MR. ROTHWELL: Well, your Honor, we are going to have to try to prove some facts about --

THE COURT: Well, I am not interested in your having trouble with it. You just tell the jury what you think you are going to prove.

MR. ROTHWELL: We are going to prove that the reputation and the injury therefore is a thing of value and it is worth all of our time and attention. We are going to prove that it is no small thing to be memorialized as a person who engages in lying for pay in the great New York Times.

Mr. White-Stevens is a professor at Rutgers University. Dr. Jukes and Dr. Edwards are here from California. Each of them will take the stand and each of them will talk about their experiences in reference to this event and how it has affected their lives.

We are also going to listen to some defenses. These gentlemen were most active in the controversies relating to something that this case is not about, that is the subject of DDT, the now banned pesticide.

We are going to hear a little bit of the echos of that controversy in connection with the presentation of plaintiffs' case and also I believe the presentation of the defendants' case.

However, in conclusion, I just want to emphasize to you that this matter deals with the reputation of three educated gentlemen who did not deserve the treatment that they received from two great institutions. One, The New York Times, and two, The National Audubon Society.

Thank you.

THE COURT: Mr. Agoglia.

MR. AGOGLIA: Your Honor, may it please the Court and counsel, Madam Forelady, madam and gentlemen: I will spend a few moments with you now outlining just generally what we intend to prove. I think it important, otherwise I would have waived it to do this so that you can better follow the testimony, particularly since there are sometimes interruptions between witnesses, and so if you have a broad base or broad outline I think it is easier for you people tofollow along with us as the case goes in.

So, truly, that is the purpose of an opening because what I say here is not evidence in the case, you understand that. That can only come from witnesses under oath on the witness stand.

It is important to know just generally that there was what might fairly be labeled a heated controversy on the issue of DDT and pesticides. And The Audubon Society whom I represent, and I think it ought to be made clear at this time, there are three men who are also being sued here as defendants, two of whom are seated there, Mr. Arbib and Mr.Clement, Mr. Clement being the vice-president. Would you stand please, and Mr. Arbib being our editor. And these men are being charged with making certain statements which goes to their reputation as well.

And so we intend to prove that what was said by them was the truth. And here is what I intend to prove as far as this case is concerned.

There was a controversy raging and language was used by the plaintiffs far in excess of what they charge in this case that we used against them. And I will prove that to you conclusively not from any independent source, from the mouth of each and every plaintiff in this case. And I will prove to you madam and gentlemen, that the Audubon Society was publishing a booklet and in the booklet was a foreword. And the foreword made statements which were accurate and true. And no names were mentioned. And that foreword was done by Mr. Arbib who is here and who is being sued in this case.

Subsequent to the publication of this foreword, the book went out and sometime thereafter a chap named Devlin, an experienced reporter for The New York Times contacted Mr. Arbib and said, Mr. Arbib would you give us the names of these people whom you claim, and this becomes important, because my friend told you about how he is going to dot every I and cross every T and how what he said is going to be his bond and his oath, but just hear what I am going to say to you.

They were asked who are these people here misusing your bird count which was the thrust of the foreword and the reason for the forward, and you will see that very clearly because we are going to give you the foreword to analyze and study in this case.

And Mr. Arbib said look, it is not terribly important, it's been going on for years, you don't need the names.

But Mr. Devlin persisted and it was more than two calls involved, three calls, Mr. Devlin says one and I think we can establish that is not accurate at all.

In any event, they finally, Mr. Arbib went to Mr. Clement and said who are these people who are misusing ourbird counts to justify the use of DDT? And that was what this is all about.

And finally Mr. Arbib getting pressure from Mr. Devlin from The Times said well, here are five men whom we contend have misused, now listen to what I say, have misused the bird count, our Christmas bird counts to justify their position that DDT had no deleterious effect upon the bird population of this country.

And we will prove to you, and I think you will hear Mr. Devlin admit it, that Mr. Arbib said, look, don't usethe names, it is not necessary. If you want to say what we say is absolutely true go ahead, but don't mention the names. He said as a matter of fact, don't use the names and don't call them liars.

All right, Mr. Devlin goes back to The New York Times. And we of course have no trouble over him from that point on. And Mr. Devlin,and you will see this is very important in the case, writes what we call a summary of his activities which he presents to an editor to see if The Times executive personnel will accept this summary as a newsworthy item and if they do then he writes his article which they call, I think, a copy.

In any event, most unusually, not one but three summaries are written by Mr. Devlin. And we are going to be very interested in asking why in this case there were in fact three summaries and Mr. Devlin will tell you without the slightest qualification, normally one.

So you are going to have to make some judgments about what went on after this process left the telephone call to Mr. Arbib.

Andso it is the position of Audubon that anything that was done thereafter and why it was done you are going to have to decide. It is not chargeable to us. We neither authorized it nor directed it. In fact, we even limited veryseverely what we told Mr. Devlin and I think Mr. Devlin will be man enough to admit that in this case.

And we intend to show you under any circumstance in this case that a charge is made by these plaintiffs of what we call actual malice. And those words are key, vital, absolutely essential words that you know were notice were not even mentioned in plaintiffs' opening.

Actual malice was charged against Audubon and the three executive personnel of the Audubon who are sued here. And we say, madam and gentlemen, that we will establish to your absolute satisfaction that there was no actual malice in this case at all. That anything that was done from the time the phone call was on was outside our control.

Now, you will see that there is an item that was not mentioned, I think it ought to be mentioned to you. The day following the publication Mr. Clement wrote a letter under signature of Mr. Arbib because Mr. Arbib wasnot intown, he was attending a convention in the course of his business for Audubon in, I think, North Dakota, and that letter is the subject of certain claims by the plaintiffwhich they intend to establish actual malice through.

And I am going to have that letter before you and Iwant you to read that and analyze that and you will read boththe forward, The Times article and the letter subsequent thereto. And I think we will establish under this case, number one, that what we said in essence was the truth, number two, that we neither authorized, directed nor encouraged The New York Times to use the word liar when they had the names of these men, that those names were really restricted under any circumstance.

In this case there will be no proof of actual malice on the part of The Audubon Society, and/or the people, the representatives who are being sued.

I say to you, thank you kindly for your attention at this time, I am most grateful.

THE COURT: Mr. Abrams.

MR. ABRAMS: May it please the Court, we each pick different places to stand.

Ladies and gentlemen of the jury, you have heard from Mr. Rothwell representing the three scientists who are suing in this court, now from Mr. Agoglia who represents The Audubon Society and the three individuals who are employed by The Audubon Society.

I represent The New York Times together with my associates who have already been identified for you very kindly by Mr. Rothwell.

I was struck by the beginning of what Mr. Rothwell had to say to you. Up to that point in which he said check me later, check me at the conclusion of this case and see if I have told you anything that is wrong. I was struck by it because our view is that everything Mr. Rothwell says up to that point was right. And we have no quarrel with any part of that which Mr. Rothwell said up to that point in his opening.

Let me run through with you the facts that we think will be established in this case. Before I do so, let me make one thing very clear because Mr. Rothwell did tell you that the purpose of this case was to vindicate the reputation of three three scientists.

I say this first so there will be no misunderstanding about our position. We will make no attempt on the truthfulness of the scientists who have come to this court. We will make no attack on their truthfulness.

Now, what is at issue here? The facts will show, and I think that the other two counsel have already said as much, that for at least ten years in America there ranged a great debate about pesticides, about DDT, about birdlife. It was heated. Very heated. You will hear many of the words used by the participants in that debate. The words that I suppose you will hear first and certainly the wordsyou will hear soon are the words which started us down the road to this lawsuit, which is to say the Foreword of American Birds which The New York Times reporter did read as Mr. Rothwell told you.

And it contained very strong language. Not as strong I think as some of the language that the plaintiffs themselves have used, which you will also hear I think, but very strong language which said that there were certain paid scientist-spokesman, it said that they were saying things for the most self-serving reasons. And it used a very,very strong line which you will hear about from all ofus which I will come to in a moment.

Now, on the one side of this debate at least in part was The Audubon Society which has taken very strong positions against the use of DDT. On the other side are these three plaintiffs who have taken very, very strong positions in favor of the use of DDT.

Now, the evidence that we will present to you, what we think that you will conclude, is that Mr. Devlin accurately reported what the Audubon Society had to say. Accurately, honestly, reported what he was told on the phone by Mr. Arbib when Mr. Devlin called him.

And Mr. Devlin did, after reading that very strong language in American Birds. The strongest of language you will hear in that is a line, any time you hear a scientist saying the opposite you are in the presence of someone who is being paid to lie or is parroting something he knows very little about.

Mr. Arbib called -- Mr. Devlin called and asked him who told him that; who is the article about? And after some hesitation as Mr. Agoglia correctly says, maybe after one call or more, he was told, he was given names and he printed those names and he said Mr. Arbib of The Audubon Society said the people that you were talking about is A, B, C, D, E, five scientists, three of whom have sued in this court.

Mr. Devlin will tell you what his phone call with Mr. Arbib was and Mr. Devlin's accuracy with respect to that phone call will be confirmed not alone by the fact that he said it to you and that you will believe him, becauses he isan honest man, but by the letter which The Audubon Society sent the next day to The New York Times which you will also have read to you and which in our view confirms the accuracy of what Mr. Devlin quoted Mr. Arbib as saying.

And it will also be confirmed by internal documents of The Audubon Society which read fairly in any sense -- proper sense of the word fairly, will also lead you to conclude that Mr. Devlin got it right, and fairly and accurately reported what he had been told by Mr. Arbib and the contents of what American Birds had to say.

And if you do find that, then everything else is based on the charge I believe Judge Metzner will give you, the law that he will tell you applies here. Then you will and should rule in favor of The New York Times.

And in fact, even if you should believe that in any fashion Mr. Devlin erred, he made a mistake, that there wasany misunderstanding at all and I don't think there was, but that there was any misunderstanding at all about what he was told on the phone, even if you should find that, I think you will also find that Mr. Devlin thought that what he was printing was exactly what he had been told by Mr. Arbib.

That he didn't do it purposely wrong, that he didn't print it with malice and that he tried at best to put it down as he had heard it.

And if you find that, even that then we think on the law as it will be explained to you, you should rule in favor of The Times. In a sense it is only if Mr. Devlin lies to you today about his state of mind, about what happened four years ago, that you can properly rule against The Times. Four years is a long time. It is a long time for all of us and for every witness in this courtroom.

I put it to you that with Mr. Devlin's testimoney, with the Audubon letter to The Times and the documents of Audubon, that entirely aside from anything else, youwill conclude that Mr. Devlin did get it right and that for that reason, based on the law, that there should be no verdict against The Times in this case, entirely aside from the controversy that exists between The Audubon Society and these three plaintiffs.

Now I urge you to sit back and listen to the witnesses and to make you decision as to who is telling the truth, ifyou think anyone isn't, or who is closest to the truth.

Mr. Devlin is a fourth person whose reputation is at stake in this case, or a seventh if you count the three defendants from The Audubon Society. It is not just these three people who are suing who have put their reputation in risk. Mr. Devlin has been a reporter for twenty-five years. He is honest and serious and sober reporter of The Times and he did get the story right and there is no liability in this case for The Times.

Thank you.

THE COURT: Ladies and gentlemen, we will adjourn for lunch and resume the trial at 2:00o'clock. You will report back to the jury room in back of the courtroom.

(Jury leaves)

(Luncheon recess)

AFTERNOON SESSION

2:00 P.M.

(In open court - jury present)

THE COURT: You may proceed.

MR. ROTHWELL: I call John Charles Devlin.

JOHN CHARLES DEVLIN, SR.,

called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROTHWELL:

Q Mr. Devlin, will you please state your employment.

A I am a reporter on The New York Times.

Q How long have you been in that position, sir?

A A little over twenty-five years.

Q Would you tell us very briefly as to your background, that is when you went to work twenty-five years ago, what you did at that point and bring it up, just a little summary outline so that we will know who you are.

A I started out on what is known as the re-write battery. This is a group of about five or six reporters who sit in the front part of the news room, and take notes from reporters who are out in the field. The idea is to take these notes and write the stories against deadlines. If the reporters were out in the field had to come in first and write stories they would miss an edition. The result is they call the information in and to somebody on the re-write battery and there copies are then written against a deadline.

Frequently the deadline is so close that the story mayhave to be written a paragraph at a time. You call the copy boy, he takes it over and then it goes through channels.

Q How long since you have had that position, Mr. Devlin?

A Well, I held that position I guess for about five or six years and then went on to what is known as general assignment.

This is a daytime operation where basically my hours would be from 10:00 in the morning until 6:00 in the evening, and as a general assignment reporter I would be available for any type of story breaking regardless of what it was.

And it was during this period when I began to specialize in the natural science and began doing stories more and more in the field of zoos, the American Museum, Audubon Society, oceanography and that sort of thing.

Q You mentioned that you became specialized. Do they have a particular name for that specialty that is used?

A Not really.

Q In other words, are you properly described as a nature reporter?

A As a general assignment reporter specializing often in nature.

Q Nature stories and natural news items?

A Nature stories, yes.

Q Fine.

Now, how long have you had that specialty in your mind? Does this go back a few years?

A This goes back a number of years, yes.

Q What, ten years? Twelve years?

A Ten, twelve, fifteen years.

Q Yes. Are you the same Mr. Devlin that is the author of a story that is in part the subject matter of this litigation?

A I am.

MR. ROTHWELL: Your Honor, I request permission to examine this witness pursuant to the rules governing the examination of adversary witnesses.

THE COURT: You may proceed.

MR. ROTHWELL: Thank you, your Honor.

Q Mr. Devin, how long have you known, or had any relationship with National Audubon Society?

A I can't specifically say, but it's been many years.

Q Does that go back as far as ten or twelve years since you have been a nature reporter?

A Yes, I would say so.

THE COURT: Wait a second. We have all heard of The Audubon Society. What is the relationship with The AudubonSociety, aside from mere knowledge. I think everybody here has heard of The Audubon Society. That's not your question, is it?

MR. ROTHWELL: No, your Honor.

THE COURT: Well, then why don't you specify what you mean.

Q Would you please state for us, Mr. Devlin, what your contacts were and associations with National Audubon Society have been?

THE COURT: In your work.

A In my work as it concerned The National Audubon Society itwould be a case obviously of attending annual meetings, conventions, going on field trips. If I heard about an unusual bird I would call The Audubon Society and find out if it were unusual enough for The Times to carry a story about the bird, and perhaps a photograph.

Q You were pretty well familiar with the people over there?

A With a number of the people there, yes.

Q Yes.

Did you study at any time in any normal sense birds, a subject known as ornithology?

A No, I have not.

Q What is the situation, did you pick this up in terms of a sort of hobby or an amateur interest? Would that be the fair way to say it?

A Yes, I think that would be a fair way to say it. From childhood I have lived in suburbs and been fairly close tothe outdoors in general, and I can remember as a child my mother putting out bird crumbs and I became more and more interested and have continued to live in the country and I became more and more interested in the environment and in ecology and conservation in general. And have made it a hobby.

Q You were on quite familiar and intimate terms I gather, then, with certain individuals of The National Audubon Society?

MR. AGOGLIA: I object to the form of that question.

THE COURT: Sustained.

MR. ROTHWELL: Withdrawn.

Q Did you have any other relationship with The National Audubon Society that you have not described, Mr. Devlin?

May I suggest, did you write for them?

A I am sorry, I didn't hear --

Q Did you write for them? Did they ever publish any of your work?

A Yes. I wrote several articles for Audubon Magazine, two or three I believe.

Q And these were published in The Audubon Magazine?

A They were.

Q This is not the American Bird Magazine about which we have been discussing?

A No.

Q All right, fine.

Moving on, would you please tell us about the -- what you know about the Audubon Christmas bird count? Just let us -- what is that and what happens?

A Well, the Christmas bird count began, I believe, around 1900 and it is a case where people interested in birds go out usually during the Christmas week and with field guides or without, and with binoculars, and make a record of the various birds that they see in a limited area.

Usually it seems to me it is within the radius of about 15 or 20 miles of a given point.

Q You mentioned a field guide. What was that?

A Well, a field guide is -- there are a number of field guides, and these are usually pocket-sized books which have illustrations of birds and identification marks and some capitoned material describing where they are normally found. And at what seasons.

Q And this is to assist the bird-watcher or the bird-counter --

A Yes.

Q -- to identify the birds that he sees or she sees?

A That's right.

Q Have you participated in these Christmas bird counts?

A I have on occasion as a reporter.

Q Have you not participated then as a counter?

A No.

Q I see.

Have you written articles and stories for The New York Times about the Christmas bird counts?

A Yes, I have.

THE COURT: When you say you participated as a reporter, does that mean you went out with other people or went out by yourself?

THE WITNESS: NO, I went out with a bird group in order to do a story on the Christmas bird activity, bird count activities of this group.

THE COURT: One more question, Mr. Devlin: Is this bird count conducted through groups going out, or is each one assigned an area and he goes out by himself?

THE WITNESS: Usually they are different groups for different areas which go out as a group, yes, sir.

THE COURT: Thank you.

BY MR. ROTHWELL:

Q Mr. Devlin, are you familiar with the fact that The Audubon Society publishes rather specific rules to govern the activity of Christmas bird counting?

A Yes.

Q And they do have these -- these standards or protocols or directions. Are you familiar with those?

A In a general way, yes.

Q Yes. And they do change a little from time to time?

A I don't recall any changes.

Q I see.

Are you a member of The National Audubon Society?

A No,sir.

Q Do you receive their published material insofar as you know?

A I do, yes.

Q And what does that comprise? What does that include?

A Well, number one, I receive regularly the Audubon Magazine which is published by The National Audubon Society and in addition to that their public relations department would regularly put out a news release to the press and I am on that mailing list.

Q Did you also receive copies of the Audubon field notes?

A I received that, yes.

Q What were those? Can you describe to us what they were?

THE COURT: What are field notes, Mr. Devlin?

MR ROTHWELL: Your Honor, I may be able to save a little time.

Q Mr. Devlin --

THE COURT: Don't you want him to describe it?

MR. ROTHWELL: Yes, but I think the witness is having a little trouble with my question and perhaps properly so, your Honor.

THE COURT: I see. All right.

Q I want to ask you aboutAmerican Birds.

A Yes.

Q Do you know what I am referring to?

A I do, yes.

Q Are you aware that the predecessor publication was called Audubon Field Notes?

A Yes.

Q Did you receive those?

A I don't recall having received those.

Q I see. But a time came when the name of Audubon Field Notes was changed to American Birds; is that correct?

A That's correct.

Q Then you did receive those?

A Yes, I did.

Q Did you receive those -- you received those in what capacity, in your capacity as a reporter?

A Yes, that's right.

Q Do you remember how the wrapper, if there was a wrapper, or the label --

MR. ROTHWELL: Excuse me. Let me withdraw that.

Q You received these through the mail; is that correct?

A Through the mail, yes, sir.

Q And do you recall how they were addressed to you or to The New York Times?

A I am sure they were addressed to me.

Q To you at The New York Times?

A At The New York Times.

Q Not to your home?

A No. No, sir.

Q Moving ahead to the period under discussion here, which is the summer of 1972 --

MR. ROTHWELL: May I approach the witness, your Honor, for the purpose of --

THE COURT: Yes.

Q Would you look at this, Mr. Devlin?

(Handing)

THE COURT: First have it marked for identification.

MR. ROTHWELL: This, your Honor, has been marked, the foreword thereof, this is the precise book that was used by Mr. Devlin. It is a --

THE COURT: Neither me nor the jury nor the reporter know what you are talking about. Please indicate for the record what you have shown the witness.

MR. ROTHWELL: Plaintiffs' Exhibit No. 2 which is the -- excuse me -- Plaintiffs' Exhibit No. 1 which is the American Birds edition dated April 1972.

THE COURT: Is there any objection to this document? Mr. Abrams?

MR. ABRAMS: No, your Honor. I think counsel misstated the number of it though. It is Exhibit 2, not 1.

MR. AGOGLIA: No objection, your Honor.

MR. ROTHWELL: I am sorry, your Honor. We had had thesein the complaint with different numbers. But now for the purposes of the pre-trial order it is Exhibit 1.

Q Can you identify that, Mr. Devlin?

A Yes, sir.

Q Is that the particular book you --

THE COURT: Wait a second. My clerk knows nothing about what you are talking about. Where is the book? Give it to the clerk and have him mark it.

MR. ROTHWELL: Your Honor, it has been marked. I am sorry, I should have made that clear.

THE COURT: The clerk has not marked it he tells me.

THE CLERK: Plaintiffs' Exhibit No. 2, your Honor, received in evidence.

THE COURT: All right. Exhibit 2.

(Plaintiffs' Exhibit 2 received in evidence)

BY MR. ROTHWELL:

Q Mr. Devlin, is this the -- do you recognize this asthe book that you read or looked at during the --

A I do.

Q -- summer of 1972?

A That's correct.

Q All right. And more specifically did you read the foreword thereto?

A I did.

MR. ROTHWELL: Your Honor, since we will be examining the witness extensively in reference to this foreword and in reference to his article, there is a stipulat from all parties as to the admissibility of these exhibits and I ask the Court's permission to put blown-up photographic reproductions of said items on the easel so that we can all follow it more intelligently and more readily, if I may say.

THE COURT: I gather you are referring to Plaintiffs' Exhibit No. 2 which is the foreword to the April 1972 --

MR. ROTHWELL: Yes, your Honor.

THE COURT: Fine. I don't think anybody can read that.

Q Mr. Devlin, can you see those?

A I can, yes.

Q Now, can you tell us what of this language attracted your attention in particular?

A I cannot read it from here.

Q I see. Well, now may I then hand it to you --

THE COURT: Why don't you leave it up there and give him the book itself?

MR. ROTHWELL: Yes, your Honor.

MR.ABRAMS: Your Honor, if I may, I would just like to clarify for the record that the copy Mr. Devlin has in front of him has certain handwritten marks he made on it at the time he read it.

I have no objection to the cross examination with the blown-up versions out here, but there are marks on the copy that the witness has.

THECOURT: I gather that Exhibit No. 2 is admitted without his handwriting notes.

MR. ABRAMS: It was an exhibit together with his handwriting notes because it is in the volume which he has.

THE COURT: Well, shouldn't it come in without his notes?

MR. ABRAMS: Well, I --

MR. AGOGLIA: His notes certainly would not be binding on my client, your Honor.

THE COURT: I would assume a clean copy could be obtained,could it not, substituted for the one he has in his hands with his notes on it?

All right, go ahead.

BY MR. ROTHWELL:

Q Do you understand the question? I asked you to identify the passage thatattracted your attention.

A Yes.

Q Would you read that passage? Please read it aloud.

A Well, this is marked Foreword, and the first paragraph is a resume of the 72nd Christmas bird counts, and in the second paragraph I have marked and circled the following, and I now quote:

"We are well aware that segments of the pesticide industry and certain paid 'scientisits-spokesmen' are citing, Christmas bird count totals (and other data in American Birds) as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradeable hydrocarbon pesticides."

The next paragraph, also marked as follows:

"This, quite obviously," and I have underlined the following "is false and misleading, a distortion of the facts for the most self-serving of reasons" and I have underlined most self-serving of reasons. "The truth is that many species high on the food chamber -- high on the food chain, such as most birds eating raptors and fish either are suffering," and I have underlined the next two words "serious declines in numbers as a direct result of pesticide contamination; there is now abundent evidence to prove this. In addition, with a constant dimunition of nature habitat, especially salt and fresh water marshes, it is self-evident that species frequenting these habitats are less common than formerly."

The third paragraph, and I have marked this in the margin:

"The apparent increases in the number of species and individuals on the Christmas bird counts have, in most cases, nothing to do with the real bird population dynamics. They are the result of ever increasing numbers of birders in the field, better access to the count areas, better knowledge of where to find the birds within each area, and increasing sophistication in identification." End of paragraph.

Then I have circled and marked the following, the next paragraph which follows:

"With increased vocal coverage by the press of Christmas bird count activities, it is important that count spokesmen reiterate the simple and truthful facts and that what we are seeing is the result" and this is italicized, the following, "is the result of not more birds, but more birders. At any time you hear a "scientist" say the opposite, you are in the presence of someone who is being paid to lie or is parroting something he knows little about." End of paragraph.

I have marked the paragraph which follows which says, "Thedevoted reader will find much of topical interest inthe pages of CBC's that follow. Some of the highlighted in the summary by our Christmas count editor, but much of it necessarily omitted for the sake of brevity. Notable incursion of snowy owls, Bohemian wax wings, and all the 'winter finches' were evident, especially of redpolls. It was a good year -- if not the best year ever -- for gyrfalcons, but hawk owls were conspicuous -- hawk owls were conspicuously scarce. Southern and South Western counts listed more late lingers, especially warblers than ever, thanks to the wet and warm autumn."

Q Well, Mr. Devlin, I --

A There are some other marks farther down on this page. I don't know if you want me to continue.

Q No, I don't want you to read them.

Was there something in the material that you have readas reproduced here in this exhibit that made you feel that there was a news story involved?

A Very definitely.

Q Would you tell us what you did, the first thing you did, after you reached a conclusion that there might be a story arising from this material which you have read?

A Well, in a case like this, I would do one of two things: Report immediately to the City Editor, and then call the author --

THE COURT: No, he wants to know what you did in this case.

A I am not positive what the immediate next step was.

Q So as best you can tell us, Mr. Devlin, you did take some follow-up steps, did you now?

A I did.

Q All right. What is the first one that you can now recall?

A Well, I called the author of the foreword, and it is signed Robert S. Arbib, Jr.

Q Can we fix a time on this at all? What dates are we talking about?

A Well, this is the April issue, but it was delayed in coming out. It did not reach my office until August. So this would have been early in August of 1972.

Q Could it have been late in July of '72, Mr. Devlin?

A Possibly.

Q Possibly. You say you called Mr. Arbib?

A I did.

Q Did you know that gentleman?

A I did and do, yes.

Q You did know him.

A I did.

Q What was said during that conversation with Mr. Arbib?

A Well, I said I found this very interesting and dramatic statement and it was certainly something that would make astory for The New York Times, and who were these gentlemen to whom he was referring.

Q Can you remember anything else said during that conversation? What did Mr. Arbib say for instance?

A He said he was reluctant to give the names of these persons.

Q Doyou recall what response you made to that, if any?

A Yes. I said I thought it was very important to have the names because it seemed to me that the chemical -

MR. AGOGLIA: I am going to object -- excuse me for interrupting, sir.

What seemed to him or the operation of his mind --

THE COURT: I gather this is the conversation.

MR.AGOGLIA: He is now talking about what seemed to him, that is --

THE COURT: That is not so.

MR. AGOGLIA: That would be the operation of his mind.

THE COURT: That would be true if that is what he was saying. But --

MR. AGOGLIA: Can we have it read back? It seemed to me that is what he was saying.

THE COURT: Proceed.

MR. AGOGLIA: Can we have it read back, what he was saying?

THE COURT: No, I overruled your objection.

MR. AGOGLIA: Very good, sir.

A I was impressed by the fact that --

THE COURT: Now, wait a second. You are being asked about the conversation. What did you say to him and what did he say to you?

A Well, this was four years ago --

THE COURT: Well, to the best of your recollection.

A To the best of my recollection I said, this is a very interesting story. Who were these gentlemen?

He, as I say, was reluctant to give the names. I said to him I thought it was important to carry the names because the attack seemed to reflect on the entire chemical or pesticide industry as a whole and that a lot of eminent persons might have been hurt if we did not have the names so that we could be specific about the people mentioned in the foreword. That was number one.

Number two is a matter of proper journalism, they should have been identified for the information of the public.

Q Did you tell him that?

A Yes.

Q Continue, please.

A He said that he would get in touch with me about the names.

Q And during that conversation he gave you no names in reference to your questions; is that correct?

A Not in that initial conversation, no.

Q All right.

Did there come a time when you had another conversation?

A Yes.

Q With Mr. Arbib?

A Yes.

Q When was this?

A Very shortly thereafter.

Q Within what period of time?

A I don't recall.

Q Was it a day? A week? Three or four days?

A I would say within a day, perhaps within hours.

Q Do you recall who initiated this second telephone call? Did you call him again?

A I don't remember.

Q Do you remember that there was a second call?

A There was a second call.

Q All right.

Would you tell us, please, to the best of your recollection, just what you remember about that second conversation, Mr. Devlin?

A Yes. In the second conversation I was given the names of the individuals about whom he was speaking in the foreword, plus their identifications.

I said I would want to contact them for their reaction. These names were given to me. Their associations were given to me so that I would be able to reach them.

Q They were sort of dictated over the phone to you and you copied them down? Is that how it happened?

A That's correct.

Q Yes.

Was there anything else to that conversation?

A I don't recall anything further.

Q For example, did he at the time advise you that Mr. Clement was working on an article, an article to be published on this subject?

A I don't recall that.

Q Did you talk to Mr. Arbib again about this subject at that time, on or about that time?

THE COURT: When did you next talk to Arbib about this subject?

THE WITNESS: I don't recall another conversation on this subject after receiving the names and identifications of the persons.

Q Do you remember how many names were given to you?

A Five, I believe.

Q Can you recall those five names?

A They were not names familiar to me. I would have to read them from some source.

Q But you cannot presently recall them?

A I cannot.

Q All right.

And did I hear you -- did you say you had not heard of thesepeople before? They were all strangers to you?

A One name was familiar to me. He had been a, I think he was a Dr. Borlang who had won a Nobel Prize. The names of the other gentlemen were not familiar to me.

Q Were not familiar to you?

A No, sir.

Q What next did you do about this story?

A I wrote the story. I wrote a summary outlining - a summarybeing a synopsis of a story. This would run about the size of a very fat paragraph, and turned it into my city desk.

Q This was prior to making any more telephone calls? In other words, didn't you --

A No, I did try and reach these other gentlemen.

Q Yes, well that's what we want to --

A I am sorry, I forgot that. I did try and reach these gentlemen immediately by telephone.

Q Fine.

A All five.

Q What success did you have?

A Only partial success.

Q How many of them did you talk with?

A Three, I believe.

Q Do you remember who the first one was?

A No.

Q If I suggest that you talked to Dr. Robert White-Stevens, would that refresh your recollection about the matter?

A That name is familiar to me.

THE COURT: That is not the question. Is he one of the three you reached on the telephone?

THE WITNESS: I am not positive at this point.

Q You are not positive that you talked with Dr. White-Stevens.

A At this point.

Q How about Dr. Jukes?

A I don't recall.

Q Well, all right.

MR. ROTHWELL: Your Honor, if I may please --

THE COURT: Do you recall any of the three you spoketo?

THE WITNESS: Not by name.

MR. ROTHWELL: Your Honor, I think if we get his story --

THE COURT: Wait, just a second. I am asking a question.

MR. ROTHWELL: I beg your pardon.

THE COURT: Does he recall any of the three? He says not by name. All right. Go with your next question.

MR. ROTHWELL: Yes. Your Honor, if the

Court please, I think that by proceeding with the story itself that Mr. Devlin wrote that that may refresh his recollection so he will be able to tell us a little more about this.

THE COURT: All right.

MR. ROTHWELL: May I approach the witness with the proposed exhibit?

THE COURT: You may. What are you showing him?

MR. ROTHWELL: I am showing him an article from The New York Times dated August 14, 1972 --

THE COURT: Has it been marked for identification?

MR. ROTHWELL: It has been marked for identification.

THE COURT: What is its number?

MR. ROTHWELL: Plaintiffs' Exhibit 1, your Honor.

THE COURT: Is there any objection to its introduction, Mr. Abrams?

MR. ABRAMS: No, your Honor.

MR.AGOGLIA: I have no objection except it is not binding on me, it being a report of The New York Times.

THECOURT: This is the actual story that

appeared in the newspaper?

MR. ROTHWELL: Yes, it is, your Honor.

THE COURT: All right.

(Plaintiffs' Exhibit 1 received in evidence)

THE COURT: It may be binding on you. I will take it subject to connection. Go ahead.

MR. ROTHWELL: Your Honor, may we follow the same procedure here with reference to --

THE COURT: Yes.

MR.ROTHWELL: Thank you, your Honor.

Q Mr. Devlin, you have now looked at and read what is Plaintiffs' Exhibit 1 in evidence.

A I have it before me, yes.

Q Just take a moment to read it, if you please.

A Yes, I have read it. Thank you.

Q Now, having read that, Mr. Devlin, does that refresh your recollection about some of the telephone calls you made prior to writing this story?

A All I recall is that I tried to reach all of them, I reachedsome but I do not remember which ones I did reachother than the one I have quoted in the story.

Q Now, at the bottom of the first paragraph of your exhibit, and at the top of the second --

A Yes, sir.

Q -- you wrote "Not all of the men could be reached for comment but those who could be reached ridiculed the accusation as emotional and hysterical."

Do you remember who did that?

A No, I did not.

Q Then you used the word "unfounded". Do you remember who it was that told you the story was unfounded?

A No, sir, I do not.

Q Well now, now we have got the last clause here, "Dr. Spencer said they were almost libelous," in quotes.

A Yes.

Q Do you recall talking to Dr. Spencer?

A I do.

Q And do you recall what he said? Do you recall --

A Not specifically, no.

Q Do you recall anything about that conversation with Dr. Spencer other than this clause here of several words, "Dr. Spencer said they werealmost libelous"?

A No, I do not recall the rest of the conversation.

Q I see. Well, let's see if we can -- did you read to the gentlemen you called, did you read to them the paragraphs from the Audubon foreword, the American Birds foreword by Robert Abrib? Was that your method of proceeding?

A I am sure I did.

Q Yes. And these comments that you reported at least in the story, were they made in response to that reading?

A They would have been, yes.

Q Now, this would indicate that you did reach Dr. Spencer and some others--

A Yes.

Q -- but you still can't recall who those others were that you reached?

A No, sir.

Q Did you reach one other or two others?

A I am not sure.

Q I see. Just --

A It does say others so obviously it was two or more.

Q Yes. But those who could be reached ridiculed the accusations as emotional, hysterical and unfounded?

A Yes.

Q Would it be fair to say that everybody you talked to in that category of names supplied by Arbib told you that these charges were not true? Would that be fair to say? That these charges contained in the Audubon foreword were not true?

A Well, I have used the words emotional, hysterical and unfounded.

Q But my question was, did they also convey to you in addition to the words you reported in the story, did they convey to you that the material that you think you read tothem from The Audubon foreword, you know, the material we went through --

A Yes.

Q --in the presence of someone who was being paid to lie or is parroting something he knows nothing about, that you read to these people, my question is, did they all clearly indicate to you that that charge was not true?

MR. AGOGLIA: I object, if your Honor please. He has answered the question.

THE COURT: Overruled. He is not bound by an answer of an adverse witness. He is entitled to probe further. Go ahead.

A If the word untrue had been used I would have used it inthe story.

Q Well, Mr. Devlin, are you suggesting by that answer that -- that you did report in these few words here starting "Not all of the men could be reached for comment" and then finishing up with the words "almost libelous" you know, the bottom of this column, are you suggesting that those few words contained the entirety of your phone conversations?

A The essence.

Q Do you feel that there was more in those phone conversations than you reported here?

A I think this was the essence of the conversation.

Q Well, you now think that you read to them the material from the foreword?

A True.

Q True.

Going back just for one question to that second conversation with Mr. Arbib, the conversation wherein he gave you the names --

A Yes.

Q And these are the names he gave you, correct?

A That's correct.

Q Did he tell you in any way at that time that Audubon was not calling these people liars?

A He did not.

Q Did you write that headline?

A No, sir.

Q Do you know who did?

A No,sir, I do not.

Q Has inquiry been made by you or anyone else at The Times as to that, as to who wrote the headline?

A I was asked if I could find out who did and I was unable to.

Q Mr. Devlin, was there anyone else on The Times that you checked with or contacted about this story -- I am talking about your employer at The New York Times?

A No, I simply -- I did report tothe city desk, reported the story that I had and then went to a space assignment editor and was told how much space I could have to write the story. That was all.

Q The first thing you did you say, or the first thing you mentioned, you went to the city desk?

A Yes.

Q What was the purpose of that?

A Well, the city editor who is now incidentally called the metropolitan editor is the person who gives the reporter the green light on an assignment and says, yes, cover it, or,no,don't cover it.

Q Is that the purpose of the summary that you spoke about a fewminutes ago?

A The summary is then turned in -- following this conversation it is turned in in what is called -- what we call in the news room a book. It is about eight sheets of paper with carbons in between. One copy -- it is turned over to the copy boy and then the original and carbon copies of the summary are distributed to various editors so that in planning the makeup of the paper and the layout of thepages and so on, they will have some idea of what is coming.

Q Well, does this occur before or after the story is approved that you say you got the green light?

A After I was told to go ahead and proceed with the story, to write the story, the first thing I did was write the summary and turn that in.

Q AT what stage did this occur, this summary?

A Immediately after I talked with the city editor.

Q All right.

And when did that talk with the city editor occur?

A After my conversations with these various people involved.

Q I see. So that the progression of events was that you had your talks with Mr. Arbib on the telephone and you hadthe talks on the telephone with the people as described in this material here, the bottom of the first column and the top of the second?

A Yes, sir.

Q Then after that you went to the city editor and what did you do, tell him what you did?

A I did.

Q Who was the city editor?

A Well, they have changed. I am not sure now who it was.

Q Was there anything in writing passed between you and the city editor at that time?

A Only the summary.

Q So you took the summary then to the city editor?

A To the copy boy who broke up the book and gave the original to the city editor and distributed the carbon copies to other editors.

Q But you do remember that early on in the game you did get, as you say, the green light, from the city editor?

A Yes.

Q I am going back for one further question in reference to this headline --

A Yes, sir.

Q You have a distinct recollection that you did not write it?

A That's correct, I did not write the headline. I never write headlines.

Q I see. And is it on that basis that you --

THE COURT: May I see counsel at the bench, please.

(At the side bar)

THE COURT: What is the constant reference to who wrote the headline? What importance does that have? The article is taken as a whole.

MR. ROTHWELL: Your Honor, we are going to argue that it is an element of the irresponsibility and reckless disregard of The Times to engage in such activity without --

THE COURT: Well, the article is taken as a whole. Whatever is said is said. I don't see any reason for harping on the headline. The headline is there as part of the article.

MR. ROTHWELL: Yes, but, your Honor, I would argue to the jury in closing that their practices are such they can't even tell us now who wrote the headline. We think that is an element in the wilful and reckless disregard.

THE COURT: Oh, no. No, no.

(In open court)

THE COURT: We will have a short recess.

(Recess)

(Jury present)

THE COURT: Proceed, Mr. Rothwell.

CONTINUED DIRECT EXAMINATION

BY MR. ROTHWELL:

Q Mr. Devlin, I hand you a document marked for identification as Plaintiffs' Exhibit No. 3 and I ask you if you can identify that.

MR. ROTHWELL: For the record, your Honor, Plaintiffs' Exhibit No. 3 has been -- the admissibility has been stipulated.

THE COURT: Don't you understand? The reporter does not know what you are talking about when you say Exhibit 3. It has to be identified for the record.

MR. ROTHWELL: Well, your Honor, I am trying to get the witness to do that.

THE COURT: But you have already had a stipulation that it is admissible evidence. Right?

MR. ROTHWELL: All right. I am sorry, your Honor, I didn't understand the Court's requirement in that respect.

THE COURT: It is not my requirement. If this case has to be read by anybody they will want to know what the witness is looking at. And since counsel have now agreed that you may introduce it in evidence, let the record know what you are talking about.

MR.ROTHWELL: All right.

THE COURT: What is Plaintiffs' Exhibit 3?

MR. ROTHWELL: Plaintiffs' Exhibit 3 is a letter on the stationery of National Audubon Society written to The New York Times dated August 14, 1972.

THE COURT: All right.

(Plaintiffs' Exhibit 3 was received in evidence)

BY MR. ROTHWELL:

Q Do you recognize and can you identify that letter, Mr. Devlin?

A This is addressed to the editor of The New York Times, and Ihave seen a copy of it.

Q All right. Thank you.

Mr. Devlin, when you talked to these people that you wrote about here, and all of the parties reached said such and such and so and so you remember that.

A I am sorry, I can't hear you.

Q I am sorry, sir.

You said not all of the men could be reached for comment and so forth.

A Yes.

Q When you talked to these men, did they suggest that they would send to you some material? Did any of the people you talked to, it says "None of the men could be reached for comment," et cetera.

Did any of the men you talked to suggest that they would be sending you some material on the subject?

A I do not remember that.

MR. ROTHWELL: No further questions, your Honor.

THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. AGOGLIA:

Q Mr. Devlin, I take it you have discussed this case with your counsel, or counsels, before you took the stand here this afternoon; would that be an accurate statement?

A Yes, it would.

Q And did you go over it with great detail with them?

A Not in great detail, no.

Q Do you recall testifying at a pre-trial examination, or an examination before trial?

A Yes, I do.

Q And it went on for two days, did it?

A About that.

Q Do you recall testifying under oath, sir, that there was one telephone call between you and Mr. Arbib?

A On what date?

Q I will put the question to you again --

THE COURT: May I suggest you take that easel out of the way? It seems to be impeding your movement in examining the witness.

Q Do you recall again, Mr. Devlin, that you testified under oath at your examination before trial --

A Yes.

Q -- that there was only one call between you and Mr. Arbib?

A Initially that was so.

Q Initially that was so, is that your answer?

A Yes.

Q What does that mean?

A It means that I called him up after reading that foreword and discussed it with him and asked for the names of the persons involved.

Q And wasn't it your testimony that --

MR. ABRAMS: Your Honor, I am not sure the witness is finished answering. If counsel will give him the opportunity --

MR. AGOGLIA: Forgive me if I interrupted.

Q Did you finish, Mr. Devlin?

A Well, what I was saying was that I called Mr. Arbib after reading that and asked for the names of the persons to whom he was referring in the foreword.

Q Are you finished?

A No.

Q All right. Go ahead.

A I do not believe that he had those names at his fingertips at that time, and that there was a subsequent telephone conversation.

Q But you did testify under oath on November 13, 1974, that there was in fact only one conversation --

THE COURT: Page?

MR. AGOGLIA: 42, your Honor. LInes 12 through 17.

THE COURT: Read to the witness when he gave those answers to those questions.

Q "Q Did this take place in one conversation, or was there more than one call about this with The National Audubon people? That's the question, sir.

And did you make the following answer:

"A No. My recollection would have been that this would have been just the one telephone call. We are working against deadlines, of course."

Doyou remember that answer being given?

A If it's in there, I gave it.

Q And did someone between the time you gave this answer and you took the stand today, suggest to you that there was perhaps more than one call?

A No.

Q Did you read the deposition of Mr. Arbib between the time you gave this answer and the time you took the stand today?

A I have read that deposition over the past weekend, if that's the one you are referring to.

Q Perhaps I am not being clear. Let me put it to you again, Mr. Devlin, if I may, sir.

Did you read the deposition, that is the testimony given by Mr. Arbib between the time you gave this answer in November of 1974 and today?

A I don't believe so.

Q Did anyone suggest to you, between November 1974 and today that Mr. Arbib had testified that there were more than one telephone calls?

A I have no recollection of that.

Q No recollection of anyone telling you that?

A No.

Q Do you have a good recollection would you say, Mr. Devlin?

A Normally.

Q What day of the week did this conference or conversation with Mr. Arbib take place?

THE COURT: Is that going to prove recollection, a day of the week four years ago?

MR. AGOGLIA: It might very well, sir, yes.

THE COURT: I don't think so.

MR. AGOGLIA: Would you give me the chance to try?

THE COURT: No.

MR. AGOGLIA: Fair enough. I will be happy to be bound by the Court's ruling.

THE COURT: Thanks for being bound by my ruling.

Q Sir, would you be good enough to tellus what month it was that you had this call with Mr. Arbib?

A August 1972.

Q And do you recall --

A Is the date of it -- when the story was published, obviously it would be just prior to that.

Q In other words, the story was published August 14th, is that right, sir?

A I believe so, yes.

Q Well, that is when it appeared in your paper.

A Yes.

Q You meab it had been a day or two prior to that?

A I am not sure.

Q Well, what is your best recollection? We are now testing your recollection. That seems a fair enough test, doesn't it?

A Four years ago when that story ran, the same day I wrote it ornot, I don't know.

Q Well, was it within let's say a week before the publication?

A Possibly.

Q Was it two weeks before the publication?

A I doubt it.

Q Wasn't it sometime in July that you spoke to Mr. Arbib?

A It could have been.

Q That would have been more than two weeks before, wouldn't it?

A Slightly more, yes.

Q Do you remember whether it was in the morning or afternoon you spoke to him?

A No.

Q Do you remember, sir, whether or not in fact there was a controversy going on between the proponents of DDT and those who wanted it banned? Let's say for some period of time prior to July of 1972?

A Yes.

Q And you were intimately connected with that controversy?

A No.

Q Were you familiar with it?

A Familiar with it.

Q How familiar?

A It was something I read about in the papers.

Q Were you the only chap, or reporter on The New York Times that would have handled the problems involving birds or nature life?

A Not necessarily.

Q But you were a specialist so to speak, as you told this gentlemen in that field, would that be a fair statement?

A A good part of the time, yes.

Q Could you tell us for example, who the protagonis were? I mean who the pro people and who were the con people on this issue that had been going on for ten years?

Could you tell us that?

MR. ABRAMS: I object to the question, your Honor.

THE COURT: Sustained.

Q Well, could you tell us, sir, whether or not you were familiar with any federal hearings involving DDT prior to reading this foreword in 1972?

MR. ABRAMS: Objection, your Honor.

THE COURT: Sustained.

MR. AGOGLIA: Can I test his recollection, sir?

THE COURT: I think you can but I do not think that is the proper way to do it.

MR. AGOGLIA: Thank you, sir.

Q Did you attend any federal hearings in Washington on the DDT controversy?

A No, sir.

Q Did you write any articles on the federal hearings involving the DDT controversy?

MR. ABRAMS: Your Honor, I will object to the entire line of questioning. It is just irrelevant.

THE COURT: I will take this one.

Did you understand the question?

A Are you asking me whether I wrote stories that originated in Washington?

Q No. I asked you did you write any stories about the hearingsin Washington involving the DDT controversy.

A I don't believe so.

Q When you say you don't believe, do you mean you are not sure or you didn't?

A It would be unlikely.

Q Would you agree with me, Mr. Devlin, that there came a timewhen you did call Mr. Arbib and he did not have any names for you? Would that be a fair statement? That would be the initial or first call to Mr. Arbib.

A At that time he did not have the names at his fingertips.

Q Okay.

And did you call back and yougot them at some subsequent time?

A My recollection would be that I either called him back or he called me back.

Q Well, did you ever testify under oath that he said, hold the line I will get them for you, on the first call?

A I believe that was in the deposition, yes.

Q It wasn't true, was it?

A I am not sure.

Q It wasn't accurate, was it?

A My recollection is that he said hold the line, and he would check further. And when he came back with those names at that time or whether it was a subsequent conversation, I don't know.

Q You don't recollect is what you mean.

A No.

Q Is that correct?

A Correct.

Q Okay, sir.

Sir, did you ultimately have a conversation where names were given to you, five names?

A That's correct.

Q Three of whom have made claim here, two who have not?

A Exactly, yes.

Q There was a Dr. Borlang you said you remembered, he being a Nobel Prizer, so you knew what he had developed.

A Yes.

Q Strain of wheat? Is that right?

A I am not sure of the reason for his winning the award.

Q I see. When you say you are not sure, you don't recollect or you never knew?

A I never knew.

Q I see. But that was the only name of the five that you recognized;would that be a fair statement?

A That would be correct.

Q And don't you know that you did speak to a Dr. Spencer?

A I did speak with Dr. Spencer.

Q And Dr. Spencer told you,did he not, that you oughtn't to print this, that it sound almost libelous to him?

A He didn't say it. I should not print it. He did say it is almost libelous.

Q In any event, when Mr. Spencer, or Dr. Spencer, said to you this sounds almost libelous, did you consult with any of the legal authorities at The New York Times?

A No.

Q You did have to prepare a summary for your metropolitan editor, did you not, sir?

A I did.

Q And wasn't it usual to prepare one summary for your metropolitan editor?

A Normally that is the case.

Q Usually, right?

A Usually is the case.

Q In this case, as a matter of fact, sir, you prepared three different summaries at three different times, didn't you?

A I did.

Q Most unusual wasn't it?

A It would be unusual, yes.

Q Most unusual, I said, sir.

A Yes, most unusual.

Q Sir, the first summary is Audubon's Exhibit A marked for identification, and may I show you that and ask you if you would recollect that as the first summary you submitted to the metropolitan editor's desk of The New York Times following some conversation you had with Mr. Arbib and others?

(Handing)

A I have no way of knowing whether this is the first summary or not.

Q Well, is that one of the summaries that you submitted to your metropolitan desk following a conference with Mr. Arbib and others?

A Yes.

Q And did --

A The summary is not dated.

Q This summary is not dated.

A No.

Q Okay. You have no idea then when you submitted that summary to the metropolitan desk, would that be a fair statement?

A Yes.

Q Would it also be a fair statement, sir, that sometime prior to submitting this summary you had conferences with Dr. Spencer, I guess Dr. Jukes as well as Dr. White-Stevens?

MR. ABRAMS: Object to the form of the question The word conference is certainly not clear.

THE COURT: Yes, telephone call was one. So far he says he does not remember the names of the others.

MR. AGOGLIA: I am going to see if I can refresh his recollection. I think I can, sir.

THE COURT: Well, ask him.

Q Sir, don't you recall speaking with a Dr. Jukes?

THE COURT: When?

Q Subsequent to the conversation with Dr. Arbib.

THE COURT: And before writing any summary?

Q And before writing any summary.

A I do not recall that sequence.

Q Well, are you telling us that perhaps you wrote the summary without concluding your investigation, or interviews with the people whose names were given to you?

MR. ABRAMS: I object to the question, your Honor.

THE COURT: Overruled.

A It would be unlikely.

Q I thought so.

In any event, it would be most likely, sir, that before you did your summary you would get out there and do your homework; would that be a fair statement?

THE COURT: I do not know what you mean by homework.

Q You would call the people that were available for their side of the story, which you did in this case, isn't that so?

A In all likelihood.

Q Sure. Didn't you get certain correspondence from a Dr. Jukes and from a Dr. White-Stevens as a result of phone calls you made subsequent to the conversation with Mr. Arbib?

A At later dates.

Q Well, forget the dates for a moment.

THE COURT: No, no.

MR. AGOGLIA: I will get the dates. They are well before the publication, sir. If you will be patient with me, sir --

THE COURT: But you put a questionmark and you weren't putting in when, that's what I am objecting to. The witness has said that he has made telephone calls, or was able to reach three of the five. He says he remembers one of the three names and then prepared a summary. He said that twice now.

Now, if you want to cross examine him on that point, you may.

MR. AGOGLIA: Thank you, sir.

THE COURT: But don't leave it open-ended.

Q Did you receive a communication from a Dr. White-Stevens prior to preparing the summary, that is that you have identified already?

A I don't remember that.

Q No recollection at all about that?

A I don't remember the time.

Q I am not asking you about the time, sir. I am asking you did you receive a communication from Dr. White-Stevens at any time before you prepared a summary. Don't give us the exact date.

MR. ABRAMS: I object to counsel's observations, your Honor.

THE COURT: I will overrule the objection.

Q No recollection of that?

A Not positively.

Q All right.

Did you receive a communication from a Dr. Jukes before you prepared your first summary?

A I don't remember when I received that.

Q Well, you are John C. Devlin, are you not, sir?

A Right.

Q Did you receive -- and I am going to hand you

Plaintiffs' Exhibit for identification No. 14 -- did you receive that envelope with the enclosed correspondence?

(Handing)

A Yes, I did.

Q Now, would you take a look at the date of the letter of Dr. Jukes?

A Yes, it is August 7th.

Q August 7th. Does it refer --

A 1972.

Q -- does it refer to a prior conversation you had with Dr. Jukes?

A No, it doesn't seem to.

Q Having looked at that, and knowing that it was datedAugust 7th, does that refresh your recollection that you had a conversation with Dr. Jukes well prior to the publication of the article in The New York Times on the 14th of August?

A Yes.

Q Did you study the material Dr. Jukes submitted to you?

A Yes, I did.

Q Did you incorporate any of that material in your summary?

A No, it's very highly technical information.

Q All right.

Did you receive Plaintiffs' Exhibit 15, which is a letter addressed to you from Dr. Robert White-Stevens?

(Handing)

A Yes, this is dated August 8th and refers to a telephone conversation we had on Friday, August 4th.

Q Does that refresh your recollection, sir, that you did in fact have a phone conversation with Dr. White-Stevens?

A Yes, it does.

Q Did you incorporate any of that material in your summary?

A Well, I don't have the summary here but I have underlined the fact that he has said that it was a lot of nonsense and totally erroneous.

Q After receiving those two communications, did you consult with the legal authorities of The New York Times?

A No.

Q Now, you do recall you told his Honor you recall specifically a conversation with a Dr. Spencer, isn't that so?

A Correct.

Q Who stated to you that it was almost libelous;

isn't that so?

A Correct.

Q And you incorporated that, did you not, in The Timesarticle that bears your byline?

A I did.

Q Now, I am going to, if I may, show you Exhibit Audubon A, sir, which is the first summary.

Would you read that to the jury please?

(Handing)

THE COURT: Wait a second. Let me see counsel at the bench.

(At the side bar)

THE COURT: Counsel for Audubon has referred to Plaintiffs' Exhibit 15 marked for identification.

MR. AGOGLIA: Yes.

THE COURT: Showed it to the witness and then asked him whether Dr. White-Stevens didn't say that the statements in the Audubon Society were nonsense and totally erroneous. Dr. White-Stevens does not refer to the Audubon Society publication, he refers to DDT and its analogs are virtually indestructible. It has nothing to do with it. You have misled the Court.

MR. AGOGLIA: I haven't misled anybody.

THE COURT: You certainly have.

MR. AGOGLIA: Wait a second --

THE COURT: Strike all the testimony regarding Dr. White-Stevens calling this article in the Audubon Society totally erroneous.

(In open court)

THE COURT: There is nothing in that article regarding that publication in the Audubon Society.

MR. AGOGLIA: I will offer the document in evidence, if your Honor please.

THE COURT: I do not see its relevance. He is offering that in evidence.

What do you say?

MR. ROTHWELL: Your Honor, this is Plaintiffs' Exhibit --

THE COURT: He has a right to offer anything he wants whether you mark it for identification or not. He is nowoffering it as his exhibit. What do you say?

MR. ROTHWELL: Well, your Honor, if we don't get it in through this witness, I plan to offer it through Dr. White-Stevens when he testifies. I am at sea here about this development.

THE COURT: You have no objection then to his introduction of that document in evidence?

Is that correct? That is all I am asking you.

MR. ROTHWELL: That is true, your Honor.

THE COURT: All right.

Mr. Abrams.

MR. ABRAMS: I have no objection.

THE COURT: All right, I will receive it. Now mark it as your exhibit. It is no longer marked as Plaintiffs' Exhibit.

(Defendant Audubon Society Exhibit Z received in evidence)

BY MR. AGOGLIA:

Q Let me go back to Exhibit Z. Now we are going to call it for your edification, sir, which is the letter from Dr. White-Stevens, okay, sir?

Did you read to Dr. White-Stevens the foreword of Mr. Arbib during the course of your conference with him on Friday, August 4th?

MR. ABRAMS: I object again to the word conference, your Honor.

Q Telephone communication.

A I am sure I must have.

Q Was it your understanding --

MR. AGOGLIA: May I approach the witness with it --

THE COURT: Yes.

Q -- was it your understanding that in response to that he wrote to you that such hyperbolic statements serve only to arouse public consternation for factually that theyare notonly nonsense but totally erroneous.

Is that what he said in response to what you read to him?

A Yes, I believe that's so.

Q So the statements contained in this document, Exhibit Z --

THE COURT: Let me see that.

MR. ABRAMS: Your Honor, the statements in Exhibit Z --

THE COURT: I thought we just settled what that referred to.

MR. ABRAMS: Yes.

MR.AGOGLIA: He is the witness, I don't understand.

THE COURT: Well, I will explain it to you.

MR. AGOGLIA: I would appreciate it, Judge, and be gratefully in your debt. I would be gratefully in your debt if you did, sir.

THE COURT: This paragraph from which the examining counsel has taken the last sentence refers generally to literature regarding DDT. More specifically it reads, "Dr. Gordon Edwards has prepared a bibliography of over 150 papers on the degradation, both physical, chemical and bilogical of DDT in the environment, yet we see repeatedlyreiterated in the lay press, including The New York Times, that DDT and its analogs are virtually indestructible and that so 90 percent of all the DDT ever manufactured over the past 35 years and released into the environment is still there rattling around to the detriment of the biosphere. Such hyperbolic statements serve only to arouse public consternation for factually they are not only nonsense but totally erroneous."

That last sentence does not apply to the Audubon publication, for the second time I have told you that.

MR. AGOGLIA: Do you rule that as a matter of law, sir?

THE COURT: Yes.

MR. AGOGLIA: I thought it was a --

THE COURT: Clear reading does it. And if you read it you would so understand it.

MR. AGOGLIA: I have got it, Judge. I see. In any event, it is in evidence. Sir, I offer in evidence, if your Honor pleases, the document which is the first -- a summary of the witness and previously marked for identification as Audubon Exhibit A. I will show it to counsel.

(Handing)

MR. ABRAMS: We have no objection, your Honor.

THE COURT: Mr. Rothwell, do you have any objection?

MR. ROTHWELL: No objection, your Honor.

THE COURT: All right.

(Defendant Audubon Exhibit A received in evidence)

Q Would you read out loud if you don't mind, Mr. Witness, to the jury?

A This carries my name in the upper left-hand corner, the slug, and for your information all our stories carry what is called a slug if the story runs more than one or two pages. In this case the slug is "bird". So that if copyin the course of getting shuffled around in the office it is very easy to put together the various pages because of the slug, there would be only one story slug bird;another one might be slug bear, another one might be slug fish or whatever.

So in any event, this carried my name and the slug "bird" and then says "Summary, paragraph, The National Audubon Society accuses 'segments of the pesticide industry' with having 'certain paid' and then 'scientist-spokesmen' and 'who have been putting out' false and misleading distortions for the most self-serving of reasons.

"The charges made in the publication, American Birds, which contended that such a persion is 'being paid to lie or is parroting something he knows little about' when he says Christmas bird counts show bird populations are increasing. The publication did not identify by name the men it was attacking, but did give the names of some when the author was interviewed, and they disputed the charge and one said it was 'obviously libelous."

Q Now, Mr. Devlin, when this summary is given to your metropolitan editor, or the metropolitan desk, I think youcalled it, is this what would suggest to him whether or not the newspaper would carry this story?

In other words, was there a synopsis and he has to make a judgment based on this synopsis as to whether or not it is a newsworthy statement; is that a fair statement?

A It would help, yes.

Q So you did submit this summary, is that right?

A Yes.

Q And somehow it came back to you, would that be a fair statement?

A I would have kept a copy for myself.

Q In any event, you said it was most unusual to do more than one summary, didn't you?

A That's correct.

Q And in this case you did three; is that right, sir?

A Apparently so.

Q You can't give any explanation, can you, for the three?

A None.

Q None whatsoever? In any event, in that first summary there was a statement in the last --

A You called this the first summary. It doesn't say so here.

Q Okay. I am only calling it first because it is the first one as far as our exhibits are concerned; all right, sir?

A All right.

Q In any event, in that summary you used the words at the end "obviously libelous" did you not, sir?

A Right.

Q Now, you did a second summary, did you not, sir?

A Yes.

Q Forgive me for using the word "second" sir, this is the second one I --

THE COURT: Let's say another summary. Label them by number.

MR. AGOGLIA: And it is labeled, if your Honor pleases, Defendant Audubon Exhibit A-5 for identification.

Q Is this an exact copy of that summary, sir? (Handing)

A Yes, that's the summary I submitted.

MR. AGOGLIA: I offer that in evidence with the permission of the Court.

MR. ABRAMS: No objection.

MR. ROTHWELL: No objection, your Honor.

(Defendant Audubon Exhibit A-5 received in evidence)

BY MR. AGOGLIA:

Q Sir, in that summary looking at the last page, you took out -- I say you, you typed this, did you not, sir?

A I did.

Q And you took out -- do you have it in front of you, sir?

THE COURT: Here it is.

(Handing)

MR. AGOGLIA: I am sorry.

Q You took out the words "almost libelous", did you not, sir?

A Right --

MR. ABRAMS: I object to the question, your Honor.

THE COURT: He does not know which one came first and you are assuming this came second.

Q In any event, that does not contain the words "almost libelous"?

A That's correct, it does not.

Q Would you read that to us, please?

A Yes. Again it carries my name Devlin in the top left-hand corner, the slug in capitals is "Bird" and in brackets, For Sunday Edition, close brackets and then in capitals, Summary, Paragraph "The National Audubon Society accuses 'segments of the pesticide industry' with having 'certain paid scientist-spokesmen' who have been putting out 'false and misleading distortions for the most self-serving of reasons when they contend birdlife in North America is thriving' as indicated by annual Christmas bird counts conducted by bird-watchers. The

Audubon Society contends that actually the reason for the increase in the number of birds reported, despite the heavy use of pesticides, is that there is 'an enormous growth and popularity' of the annual Christmas bird counters. End of summary.

Q In other words, in that summary which we are going to call Exhibit 5-A, or A-5, there is nothing about lying is there? It says false and misleading distortions for the most self-serving of reasons.

A That's right.

Q Then you did a third summary, did you not, sir?

THE COURT: Then he did another summary.

Q Another summary.

A Yes, I have a summary here.

Q That one is dated, is it not, sir?

A This one carries the date August 11, 1972.

Q Andthe others have no dates?

A The others have no dates.

Q Could you explain why one has a date and two don't?

A I have no idea.

Q Did you prepare that, sir?

A I did.

MR. AGOGLIA: I offer it in evidence with the permission of the Court.

THE COURT: Any objection, Mr. Rothwell?

MR. ROTHWELL: No objection, your Honor.

MR. ABRAMS: No objection.

(Defendant Audubon Exhibit A-6 received in evidence)

BY MR. AGOGLIA:

Q Now, in this summary dated August 11th, that would be three days before the publication, just by looking at the date could you tell us whether or not that would have been the last of the three that you submitted before the publication of the article on August 14th?

(Handing)

A I cannot tell for sure.

Q Would that be, sir, with reasonable certainty, as far as you can recollect, the last one that was submitted in view of the fact that it is dated August 11th, meaning it was a Friday, I think -- no I had better not say that, I am not sure -- it was a Friday, yes --

A If it was a Friday and the story were released for Sunday --

Q No, Monday I think, the 14th, sir. Friday was the 11th, the 12th was a Saturday, the 13th a Sunday and the 14th a Monday.

A I think it would be a fair assumption that this might be the last.

Q I thought so.

And in that summary that you wrote, dod you give that to the same metropolitan desk as you had given the others if they in fact preceded that?

A Yes, it would have gone to the metropolitan desk.

Q Same man all the time, sir?

A Not necessarily.

Q In that --

A You see what happenes here is I turn this over to a copy boy, the copy boy breaks down the books as I have described and distributes the carbon copies.

Now, there may be from day to day a different person sitting in on the city desk.

Q All right. But it would at least go to the same locale, or site us within The Times operation would that be a fair and accurate statement?

A It would follow the same channels.

Q All right, sir.

Now, in that summary, now dated August 11th, you used the word "lying" did you not, sir?

A Yes, that's in here.

Q False and misleading does not appear, does it?

A No, they do not.

Q I am going to ask you to search your recollection if you would be so kind, Mr. Devlin, and tell his Honor and the members of the jury, did someone at The Times tell you to change from false and misleading to "lying"?

A No.

Q You have a clear recollection of that?

A I am sure.

Q But you can't give an explanation, can you, as to why you changed false and misleading to lying in quotes in that summary, which is dated August 11th?

Would that be a fair and accurate statement?

A I don't know why that would be different.

Q I see. And again, sir, searching your memory, do yourecall anyone at the New York Times suggesting that the story would be much better with lying in quotes?

A No.

Q All right.

Did you at any time after preparing that summary, sir, consult with any of the legal authorities at The New York Times?

A No, I did not.

Q Now, when you had this conversation with Mr. Arbib, and forgive me for shouting but I have been advised that we have problems hearing other witnesses, when you had this conversation with Mr. Arbib --

THE COURT: Well, I suggest you try it lowe until the witness says he can't hear you, then you can raise your voice.

MR. AGOGLIA: Forgive me, your Honor, I am sorry.

Q If you can't hear me, would you let me know?

A Thank you.

Q When you had this conversation with Mr. Arbib, sir, now the conversations, plural, did he tell you, don't use the names in your publication?

A No, he did not.

Q Did he suggest to you that it would be unwise to use the names in the publication?

A No, he did not.

Q I am going to go back if I may, Mr. Devlin, to your examination before trial, or pre-trial deposition which we spoke about which took place in November of 1974.

A All right.

Q And at page 41, sir -- no, I'd better start at page 40 because it is a rather long answer.

A All right.

Q The question was at line 17:

"Q Would you tell us as best you can recall what was said in that conversation?"

And just for your edification, sir, they are talking about the conversation between you and Mr. Arbib. Okay, sir?

A Right.

Q And did you give this answer:

"A Of course, this is going back a little time, in a case like that I would have had the article in front of me and I would have taken handwritten notes in the course of this conversation and I obviously would have been very much impressed by the information that was contained in the article and I would have wanted to verify, as we always do", I think it's a comma, "'Is the article correct as you know it? Are there any typos? Has a paragraph been dropped out?'" New sentence, sir.

This is continuing your answer, "Or has there been some sort of a mixup in putting the type together?" as happens in newspapers and magazines and the article was apparently all right and I said I would like to write a story about this as I think there would be a great deal of public interest in this, and quite obviously everybody is going to wonder who these persons are to whom you refer. Obviously it would be considerable conjecture whether it was this person or that person or whomever it might have been. I then asked Mr. Arbib if he would be kind enough to identify them for me, and he provided me with the names and titles of those persons and said that he thought that it might be better not to use the names" and it goes on.

Do you now recollect Mr. Arbib telling you it might be better not to use the names?

MR. ABRAMS: Objection, your Honor. That was not counsel's previous question. No foundation has been laid for this question.

THE COURT: He asked the witness, did Mr. Arbib ever suggest to the witness that it would be unwise to use the names. He is now reading from the deposition ofMr. Devlin in which Mr. Delvin testified that Mr. Arbib said that he thought it might be better not to use the names. I think it is proper.

Q Did you make that answer, sir?

A I did.

Q And was it -- would it be accurate when made, sir, to the best of your recollection?

A Yes, I would say so.

Q Would it be fair and accurate to state, Mr. Devlin, that your recollection in November of 1974 was a bit better than it is in June of 1976, concerning events which took place sometime in July or August of --

A I am sorry, would you repeat that?

Q I am sorry that's a bad question. Forgive me, Mr. Devlin.

Mr. Devlin, would I be fair to state this to you sir: That your recollection would have been better in November of 1974 concerning these events than it is today?

A It's possible.

Q Well, isn't it probable, sir?

A Well, that would indicate so.

Q All right.

Now I am going to ask you gentlemen to refer to page 198 of the deposition starting at line 18, again they are referring to the conversation between you, sir, and Mr. Arbib:

"Q What did he say then?

"A He said, well, he said, let me check and let me double-check on the names. I said I would like the names and the titles. And I was able to -- he did provide me with those. He expressed reluctance to The New York Times using them."

Do you remember now, Mr. Arbib telling you that he expressed reluctance to The New York Times in using these names?

A I do remember that very distinctly.

Q As a matter of fact, Mr. Devlin, didn't Mr. Arbib give you these names as people who were on the other side of the issue and had misused the bird counts in justifying their position? Isn't that the truth, sir?

A Will you repeat that?

MR. AGOGLIA: Would you be so kind?

(Record read)

A I believe it is.

Q As a matter of fact, sir, Mr. Arbib went so far to give you the locations where you could contact these various people to get their side of the issue, isn't that the truth, sir?

A I had asked for that and he provided that information.

Q And he provided it so that you could contact these men and get their side of the issue, isn't that the truth, sir?

A That's correct.

Q And you did try to get at least the side of the issue of three of these men,right, sir?

A I tried all five.

Q You say you tried all five? Do you have a clear recollection of that, sir?

A Yes.

Q I see. Did you try to get one of the plaintiffs in this case, a gentleman named J. Gordon Edwards?

A I believe so.

Q And you say you couldn't get him?

A I don't have my notes. I don't know.

Q I will try to help you out, sir.

You did, did you not, sir, make notes concerning the various -- I don't want to use the word conferences -- but telephone communications with the individuals involved that we have been talking about, that is Mr. Arbib, Mr. Spencer, Mr. Jukes and Mr. White-Stevens; is that correct, sir?

A Yes.

MR. AGOGLIA: May I call for the production of Exhibit -- Plaintiffs' Exhibit 1-A through D -- I am sorry. We have renumbered them, your Honor. I am addressing myself to the Court if I may, I am producing for the Court Audubon Exhibit B marked for identification, the first four pages thereof.

Q And I ask you if I may, Mr. Devlin, if these are the notes which you say you took starting with the first conversation with Mr. Arbib.

(Handing)

A These are my notes. They contain the names --

Q I don't mean to interrupt you, sir. They are not in evidence yet. They will be in a moment. You are not supposed to read them.

I just asked you are they the notes that you made at least at the time when you had the phone conversation, or the first one with Mr. Arbib?

A I am not sure.

Q In other words, you are looking at those notes and you don't know whether those are the notes that you took pertaining to the conversation had with Mr. Arbib, is that what you tell us?

THE COURT: No, he does not know if it was the fi conversation he had with Mr. Arbib.

MR. AGOGLIA: I see. Forgive me, your Honor.

Q Is that what you are saying, you don't --

A It says here at the top Roland Clement, it doesn't say Arbib.

Q Would you take a look at them again, sir, and see if by looking at that document it doesn't refresh your recollection that it was the notes you took of the first conversation had with Mr. Arbib where he gave you some names.

A Well, he was the person who gave me the names.

Q All right.

THE COURT: Wait a second. He has not answered your question.

MR. AGOGLIA: All right. I was going to try to help.

A And I have listed here the names of five persons --

THE COURT: He wants to know are those the notes of your first telephone conversation with Mr. Arbib.

A I can't tell whether this was the first telephone conversation I had with Arbib.

Q Okay.

In any event, it would be fair and accurate to state, would it not, sir, that those notes are the product of a conversation with Mr. Arbib?

A That's correct.

Q And do you have a date on those, sir?

A There appears to be no date on this.

Q Do those notes contain the names of the five gentlemen that Mr. Arbib gave --

THE COURT: Wait. Offer then in evidence, please.

MR. AGOGLIA: All right. Forgive me, your Honor. I offer these in evidence with the permission of the Court.

MR. ROTHWELL: No objection, your Honor.

MR. ABRAMS: No objection, your Honor.

THE COURT: All right.

(Defendant Audubon Exhibit B received in evidence)

THE COURT: Go ahead.

BY MR. AGOGLIA:

Q Mr. Devlin, do those notes contain the five names that were given you, threeof whom have sued in this case?

A They do.

Q Is that so?

A That's right, sir.

Q Do they have phone numbers on them?

A I see some do.

Q Well, does it have a phone number of a J. Gordon Edwards, a California area code prefacing the number?

A No, it does not.

Q It does not?

A Not on this first page in any event.

Q Does Gordon Edwards' name appear on the first page?

A It does.

Q May I have it please a moment?

A Here.

(Handing)

Q I guess I am in error, sir.

Would yoube kind enough to tell me, did you make an attempt to contact Mr. Edwards at San Jose State College?

A I can't recall at this time.

Q And so when you said you tried to contact all of them you really don't recall at this time whether or not in fact you did, isn't that so?

A No, as a matter of fact, on page 3 of these notes I have his telephone number, Dr. J. Gordon Edwards, Professor of Entomology, San Jose, and a telephone number.

Q Did you try to contact him?

A I would have, yes.

Q I said did you, not what you would have done.

Did you in fact?

A I am sure I did.

Q And did you make contact with him?

A There is nothing here to indicate that I did.

Q Do you know whether or not Dr. Edwards was physically present at --

A As a matter of fact, there is a note beside his name here which says, "In Montana until September 1st" so presuming that Dr. Edwards was in Montana until September 1st this would indicate he was not available when I tried to reach him at this California telephone number.

Q So the fact is you did have his address, you did have his phone number and you did try to contact him; right?

A That's right.

Q Because you had the information knowing that he wasn't there, he was in Montana; is that right, sir?

A That's right.

Q And wasn't it good journalistic practice, I guess that's a fair statement, that you should contact all these people if possible to get their version of this situation?

A If possible.

Q And that's precisely what Dr. Arbib suggested you should do, isn't that true? To get their version of this situation and the bird count and the misuse of the bird count statistics?

A I do not recall his suggesting that. That would be a natural procedure for me to follow as a routine journalistic practice.

Q I see.

Sir, he gave you the names of these five men, he gave you the location where you could contact them; isn't that true?

A I asked for that, yes.

Q And didn't he suggest to you that these are the men who had been misusing their bird count statistics and you ought to call them to get the whole picture or the other side of the coin?

A I don't recall his saying that, no.

Q You don't deny that he said it, do you ?

A I just don't recall it.

Q Very well, sir.

MR. AGOGLIA: Your Honor, could I have a moment, please?

THE COURT: Yes.

Q Are you positive, sir, that these notes that you have in front of you, which I think we call Exhibit B, were written before publication or after publication?

A I have no way of recalling at this time.

Q Do you know, sir, what you did with these notes after you made them?

A Well, what I routinely would do would be to stick them in a drawer in my desk.

Q And do you do that with all your notes?

A For the time being, yes.

Q For how long do you keep them there?

A Well, it varies, according to how full the drawer gets.

Q I see.

MR. AGOGLIA: Your Honor, could you bear with us for a minute? We have switched the numbers from the deposition -- here it is. I have it here.

Q Sir, I am going to show you these documents which I suggest are additional notes you made.

Would you agree with that statement alone, sir, without reading from them?

(Handing)

THE COURT: Are these your notes and is that your handwriting?

THE WITNESS: This looks like my handwriting, yes.

Q Just looking at that, does it refresh your recollection that at least in part those documents I have just handed you reflect a telephone communication or conversation you had with a Dr. Spencer?

A They do.

MR. AGOGLIA: They do. I offer those in evidence and I ask for a suggestion from the Court on how to mark them.

THE COURT: Why don't you call them B-1?

MR. AGOGLIA: Very good.

THE COURT: Counsel, any objection?

MR. ROTHWELL: No objection, your Honor.

MR. ABRAMS: No, your Honor.

(Defendant Audubon Society Exhibit B-1 received in evidence)

BY MR. AGOGLIA:

Q I would direct your attention, sir, to the fourth page thereof --

MR. AGOGLIA: If I may approach the witness, your Honor.

Q Okay, sir. Is the entire fourth page, numbered four, in your handwriting?

A My handwriting such as it is, yes.

Q Not very good?

A Not very good.

Q Join the club, I would say.

May I ask you this, Mr. Devlin, those do reflect a conversation had with a Dr. Spencer; is that correct, sir?

A Well, it starts there on page 1, let me see. Yes, it seemed to be all Dr. Spencer.

Q And at that time, did Dr. Spencer suggest to you that this matter that you intended to print was libelous?

A I have the note here, "State" --

Q Almost?

A Well, that would be the second sentence. It says state something not much of a scientist, then the next sentence says almost libelous charge.

Q Okay.

And then on the fourth page did he go further and use the word libelous and drop the "almost"?

A I don't see that on the fourth page, no.

MR. AGOGLIA: May I approach the witness, your Honor?

THE COURT: You may.

Q In any event, it does say on this paper, "almost libelous";is that correct, sir?

A That's correct.

Q And did you write on this paper, "Wow"?

A I did.

Q And did that suggest to you that perhaps this is a juicy one that's going to sell some newspapers?

A I am not a salesman, I am a reporter.

Q I said to you, did that suggest to you that perhaps you are going to get this article published with the wow and a byline to boot?

A No. It didn't.

MR. AGOGLIA: That's all I have, thank you.

THE COURT: Mr. Abrams?

CROSS EXAMINATION

BY MR. ABRAMS:

Q Mr. Devlin, do you have before you the copy of American Birds, which has been marked as Plaintiffs' Exhibit No. 2? I would like to put it before you.

(Handing)

You testified, Mr. Devlin, in response to questions of Mr. Rothwell, that on reading this foreword that certain passages which you read to the jury were of special interest to you.

A Yes.

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of day

Q Why were they of interest to you?

A They were very dramatic and newsworthy.

Q In what sense?

A Well, we have here, on the one hand, a very responsible source making a very dramatic charge against other very responsible people. These are news-making names. The charges are very dramatic and newsy.

Q Now, you testified at some length about your telephone call or calls with Mr.Arbib.

A Yes.

Q And I just want to ask you one or two questions about that.

Did Mr. Arbib tell you, in words or substance, that the names he was giving you, the names that he was providing you, were not the certain, paid scientist spokesmen referred to in Plaintiffs' Exhibit 2?

A Did he what?

Q Did Mr. Arbib say, "Look, I am giving you names, but these are not the paid scientist spokesmen that this article is about"?

A No, he did not say that.

Q And did he tell you anything to the effect that "I am giving you names but these are not the people who are distorting facts for the most self-serving of reasons"?

A No, he did not say that.

Q And did he say to you anything to the effect that"I am giving you names, but I am not telling you that these are the scientists about whom we mean when we said any time you hear a scientist say the opposite you are in the presence of someone who is being paid to lie or parroting something he knows little about"?

A That's a long sentence there.

Q Yes, it's a badly phrased question. Let me ask it again.

Did Mr. Arbib say anything to you in the phone call along the following lines, Mr. Devlin:

"I am giving you these names, but I want to be clear with you. I am not telling you these are the people that this line is about: 'Any time you hear a scientist say the opposite you are in the presence of someone who is being paid to lie or is parroting something he knows little about'"?

A No, he made it clear that these were the names he had given me.

Q Now, had you ever met any of these three plaintiffs, three scientists, who are suing in this court?

A No, I have not.

Q Have you met them to this day?

A No.

Q Did you write the article in the New York Times out of any desire to hurt them?

A Oh, indeed not.

Q Did you write with any ill will?

A None.

Q Malice towards them?

A None whatsoever.

Q Have you ever been sued before?

A I have never been sued.

Q Have you ever been a --

MR. AGOGLIA: I object to that and move that it be stricken, and the jury be instructed to disregard whether he has been sued before. It's totally irrelevant to any issues in this case and prejudicial to plaintiffs and my client.

THE COURT: Overruled.

MR. ROTHWELL: Your Honor, the form --

MR. ABRAMS: I will withdraw the question, your Honor.

MR. AGOGLIA: I would like an instruction that the jury be instructed to totally disregard it, particularly in view of the fact it's now been withdrawn.

THE COURT: I am sorry you made an objection and I overruled your objection. Now he wants to withdraw it and he can. With no instruction to the jury.

Go ahead.

Q Mr. Devlin, has any article that you wrote for the New York Times or any other paper ever been the subject of a libel suit?

A It has not.

MR. AGOGLIA: I object to the question, sir.

THE COURT: Overruled.

Q I didn't hear your answer.

A Never.

MR. ABRAMS: I have no further questions.

THE COURT: Any redirect?

MR. ROTHWELL: Yes, your Honor.

THE COURT: Go ahead.

MR. ROTHWELL: Your Honor, I want to show the witness documents whose markings are going to vary a little from that agreed in the pretrial --

THE COURT: I am not worried about the numbers in the pretrial order. I am worried about them being marked on this trial and I don't care what numbers you use.

MR. ROTHWELL: All right. Your Honor, if we could submit these to the witness for identification --

THE COURT: You may.

MR. ROTHWELL: -- comprising six pages of handwritten notes with the name White-Stevens, and we propose to mark this Exhibit 3B, Plaintiffs' Exhibit 3B marked for identification, and ask the witness if he can identify it.

REDIRECT EXAMINATION

BY MR. ROTHWELL:

Q Is that your handwriting, Mr. Devlin (handing)?

A Yes, that is my handwriting.

Q And up at the top it says White-Stevens?

A It says White-Stevens, which has been circled and the numeral 1.

Q What would you -- would you think that that was a note to yourself or an indication to you that these are the notes on a conference you had with that gentleman or a telephone talk you had with that gentleman?

A Well, no, it's not clear.

For one thing, there is no telephone number. For another, just below it there is a reference to the U.S. Department of Interior and Wild Life Service, and below that there is a line, and then circled is the name Dr. --

THE COURT: Wait. We're not interested in how you arrive at your answer.

The question to you is, are those notes of a conversation you had with Dr. White-Stevens?

THE WITNESS: They may or may not be. They are my notes, but whether they are with Dr. White-Stevens I am not sure.

Q If I may be permitted, Mr. Devlin, perhaps I can help you out here.

In the exhibit that's been identified as Audubon Exhibit B, which are your notes, apparently taken from one of the conversations you had with Arbib, you will note that it says Robert White-Stevens, and down here it gives a number.

A Yes.

Q So, could it be that you had this in front of you and then you pulled that paper over and made that note, those six pages of notes, while you were talking to Dr. White-Stevens?

MR. ABRAMS: I must object to the question, your Honor, as conjectural. "And could it be" --

THE COURT: I think it's a method of trying to refresh the witness' recollection.

A It's a possibility.

Q All right.

May I have that? Thank you.

I hand you what will be marked as Plaintiffs' Exhibit 3C, which is two pages -- excuse me once again -- three pages, marked up at the top with Thomas H. Jukes, and I ask you the same question. Is that your handwriting, sir (handing)?

A That is in my handwriting, yes.

Q And are those your notes relating to your conversation with Dr. Jukes? And once again, sir, may I suggest that you had Dr. Jukes' number marked on this Audubon Exhibit B. Do you see that, sir (handing)?

A Yes. I also have his address on here, I see.

These are my notes. Obviously I tried to reach Dr. Jukes.

I see some other telephone numbers here. One is home telephone number, which I crossed out; apparently I wasn't able to reach him. And below that his office telephone number. And this is dated 8/14/72.

THE COURT: He said the notes are dated 8/14/72.

Q Let me ask you about that.

THE COURT: First of all, are you offering it in evidence?

MR. ROTHWELL: I would offer both Plaintiffs' --

THE COURT: Any objection, Mr. Abrams?

MR. ABRAMS: No, your Honor.

THE COURT: Any objection, Mr. Agoglia?

MR. AGOGLIA: No, your Honor.

THE COURT: So Exhibit 3C is now in evidence.

MR. ROTHWELL: 3B and 3C.

THE COURT: Wait.

As to Plaintiffs' Exhibit 3B marked for identification, do you have any objection, Mr. Abrams?

MR. ABRAMS: No, your Honor.

THE COURT: Mr. Agoglia?

MR. AGOGLIA: No, sir.

THE COURT: Both of them are now in.

xx (Plaintiffs' Exhibits Nos. 3B and 3C received in evidence.)

THE COURT: All right. Now you may proceed.

Q Handing you the notes that are headed Dr. Jukes, would you see if that helps you remember, Mr. Devlin, what occurred during what was apparently a phone conversation (handing)?

THE COURT: Wait a second. You are drawing a conclusion here.

Ask the witness what they were.

MR. ROTHWELL: Thank you, your Honor.

Q How would you describe those notes, Mr. Devlin? I mean, what purpose --

THE COURT: What do they reflect, Mr. Devlin?

THE WITNESS: Well, they are almost illegible. We don't take shorthand; we abbreviate.

We scribble very quickly as we take notes.

THE COURT: Well, the question to you, in essence, is are they notes of a telephone conversation with Mr. Jukes?

THE WITNESS: They apparently are notes of a conversation with Dr. Jukes.

Q Now that --

THE COURT: You have left out the word "telephone" for some reason.

Could it possibly be you spoke to Dr. Jukes personally?

THE WITNESS: No. His telephone number is here, his office telephone number.

THE COURT: So they are notes of a telephone conversation; is that right?

THE WITNESS: Right.

THE COURT: All right.

Now put your next question, Mr. Rothwell.

Q Do those notes of that telephone conversation with Dr. Jukes, Mr. Devlin, serve to refresh your recollection that you did, in fact, talk with Dr. Jukes on the telephone?

A Yes, I did, indeed.

Q And in looking over the substance of those notes, is your recollection refreshed at all in reference to the substance of that conversation?

MR. ABRAMS: Your Honor, I would like to enter an objection now to any testimony with relation to the time period after publication by the Times of the August 14th article. We do not believe --

THE COURT: Well, I can't rule on that, can I, because nobody has asked him what the date of his telephone call was.

MR. ABRAMS: Maybe I was assuming too quickly. I will withdraw the objection.

THE COURT: Can you tell from those notes when you made that telephone call?

THE WITNESS: I cannot, sir.

THE COURT: All right.

Q I show you an exhibit which is marked Plaintiffs' Exhibit 14 for identification, which is a group exhibit comprising on page 1 an envelope, a Xerox copy; page 2, a letter on the letterhead of the Trustees for Conservation, signed Thomas H. Jukes, dated August 7th; and then some annexed material.

This was shown to you before by Mr. Agoglia.

Do those notes, in your refreshed recollection at this point -- and I would ask you to turn to the second page where Dr. Jukes' letter is (handing).

You see it's dated August 7th?

A Dated August 7th, yes.

Q What does it say?

A It's addressed to me, John C. Devlin, New York Times Newsroom, 239 West 43rd Street, New York 10036.

"Dear Mr. Devlin" --

MR. AGOGLIA: Hold it.

That's not in evidence. I object to reading from it now other than for purposes of identification.

THE COURT: All right.

MR. ROTHWELL: All right. I will offer it into evidence, your Honor, as Plaintiffs' Exhibit 14.

THE COURT: Any objection?

MR. ABRAMS: No objection.

MR. AGOGLIA: I object as a self-serving statement on the part of Dr. Jukes.

THE COURT: Overruled.

MR. AGOGLIA: I would add it's not in any way binding on Audubon. It's a communication between two people --

THE COURT: It may be binding on Audubon in the context of this lawsuit. I will take it subject to connection.

MR. AGOGLIA: Thank you, your Honor.

xxx (Plaintiffs' Exhibit No. 14 received in evidence.)

Q Turning to that second page once again, the first sentence says what?

A "Thank you for your telephone call."

Q All right. Now, let's stop there.

Does that help you in putting a date on your notes on that telephone call with Dr. Jukes?

A It would if this were my first telephone call with him.

Q Did you have more than one?

A I don't know.

Q Let me see. That letter is dated August 7th.

Can you make out the postmark on the envelope which is on the front, page 1 there? Is there a postal date on the envelope?

A It is but it's -- it's blurred. It's

unreadable.

THE COURT: Is there any date on your notes, Plaintiffs' Exhibit 3C, that might indicate when your telephone call took place?

THE WITNESS: There is a date, 8/14/72.

THE COURT: All right.

THE WITNESS: That's on 3C.

THE COURT: Does that refresh your recollection as to when your telephone call took place which is referred to in those notes?

THE WITNESS: It would indicate to me that, in all likelihood, the telephone call was made on or approximately that date.

Q Well now, Mr. Devlin, can you see that that 8/14 was put in with a different pencil --

A Did I --

Q Can you see that the 8/14 date was put in with a different pencil?

A No, it looks like a regular copy pencil.

Q I mean it's a pencil that's different than the other material written on that page? In other words --

THE COURT: Wait. Wait. You have asked him a question.

A It's also written with a copy pencil. It's slightly darker than the other notes on the paper.

Q Yes.

Now, may I suggest, sir, that in your habit of putting documents in the file, August 14th was the date of the publication of your story by the New York Times? Is that correct? And wouldn't you at that time naturally have gathered your material and put it in that drawer that you spoke of? And maybe you put the 8/14 there to indicate the date of publication of the story? Would that be possible?

A I don't think it's likely.

Q Well, wouldn't that be a good system? Don't you use that system for cross-reference that this had to do with an 8/14 story?

A Not necessarily. As a matter of fact, I rarely date anything.

Q I see.

You did get the Jukes information; you did receive that letter from Dr. Jukes and the attached material on Plaintiffs' Exhibit 14?

THE COURT: He doesn't deny that.

MR. ROTHWELL: All right. I am going to ask him when.

A I can't tell.

Q Do you have any recollection of having more than one telephone call with Dr. Jukes?

A No.

Q Now back to the notes with Dr. Jukes.

Looking those over, can you tell us what you talked about, what was said, the best you can?

A Well, it's extremely difficult. I see something here about Hawk Mountain Society. It looks like "president 14 years ago."

Then there is the statement ospreys --

THE COURT: Wait a minute. We are not going to go all through that.

What do you want of that document?

MR. ROTHWELL: I want to see if he remembered talking to Dr. Jukes on the 7th of August and if he got the letter --

THE COURT: Do you want him to read all the telephone notes?

MR. ROTHWELL: No, sir.

THE COURT: What do you want?

MR. ROTHWELL: Dr. Jukes is going to testify as to that conversation.

THE COURT: What do you want him to do? Ask him a question.

Q Give us your best recollection, Mr. Devlin, in reference to that telephone call, now that we have established that one was made and one was had.

THE COURT: Don't you think we would move faster if you put specific questions to the witness to bring out matters in which you are interested, rather than let him fumble through his recollection of what happened four years ago by reading practically shorthand notes of a telephone conversation?

Q Did you read the paragraphs in the foreword to American Birds?

A I did.

Q You read that to Jukes during that converastion? Did you read notes to Jukes?

A The highlights.

Q Yes, the highlights.

Did he tell you they were true, or did he tell you they were false?

A I don't recall this conversation.

THE COURT: All right.

Now look at your notes and see if they refresh your recollection as to that conversation on that particular point.

THE WITNESS: There is nothing here to indicate that at all.

THE COURT: All right.

Q Did Dr. Jukes ask you not to associate his name with that material as appearing in the Audubon foreword?

A No, he did not.

Q You remember what he did not do?

A What's that?

Q I say, you remember that he did not do that?

A He did not do that.

Q I see.

Now that you remember that, can you remember anything he did do?

A No.

Q Did he --

A It may be that he would send me some material in the mail. I am not sure.

Q I see.

There is at this point, then, a little recollection that some material would be sent in the mail to you.

A A possibility.

Q During that conversation.

A That may be.

Q Then some material was sent in the mail to you, wasn't it? And you received it? Do you know now when?

A No.

Q Did you look at it, Mr. Devlin, when you received it?

A I look at everything.

Q Well, di you look at that, sir?

A Yes.

Q Let me take that one from you and give you Exhibit 3B. This is the one that has White-Stevens (handing). Six pages of notes.

Would that suggest a lengthy telephone conversation to you, Mr.Devlin?

A Yes, it would.

Q Is there anything in that Exhibit 3B that refreshes your recollection as to the content of that telephone conversation with Dr. White-Stevens?

A I find these notes very difficult to read. I should explain, when we take notes of this type, we rely largely on the memory of the conversation and use these simply as joggers, because we invariably write the story immediately, and otherwise they would be typed out for the future.

Q And your problem is they no longer do the job of jogging; is that it?

A That's right.

Q All right. Fine.

Did Dr. White-Stevens tell you --

MR. ROTHWELL: Excuse me. I withdraw that.

Q You read to Dr. White-Stevens, did you, the material from the Audubon foreword?

A I did, yes.

Q You say the pertinent parts, those paragraphs that were newsworthy.

Did he tell you they were not true as applied to him?

A I don't recall that.

Q Do you remember the words in your story, "emotional,""hysterical," "ill-founded"?

A Yes.

Q Did any of those come from White-Stevens?

A I am not sure from whom they came.

Q How about "libelous"? Did that come from White-Stevens during that lengthy phone conversation?

A No. I think that was Spencer.

Q All right.

A Dr. Spencer.

Q Are you remembering that that did not come from White-Stevens in addition to Spencer?

A I don't recall that coming from White-Stevens.

MR. ROTHWELL: No further questions, your Honor.

THE COURT: All right. You may step down.

(Witness excused)

THE COURT: We will adjourn until tomorrow morning at 9:30. We will sit tomorrow until only 4:30 because the Court has scheduled a hearing in another matter at that time.

On Monday, the court session will be from 9:30 in the morning until 1:30 in the afternoon. There will be no afternoon session. I will see you tomorrow morning at 9:30.

(Adjournment taken to Friday, June 4, 1976, at 9:30 a.m.)

. Metzner

J. GORDON EDWARDS,
THOMAS H. JUKES, and
ROBERT H. WHITE-STEVENS

v. 73 Civ. 3153

THE NATIONAL AUDUBON SOCIETY, INC.,
and THE NEW YORK TIMES, INC.

June 4, 1976
9:30 a.m.

(Trial resumed)

(In open court, jury present)

THE COURT: You may proceed.

MR. ROTHWELL: Good morning, your Honor.

Dr. Robert White-Stevens.

ROBERT WHITE-STEVENS, called as a witness by the plaintiff, being first duly sworn, testified as follows:

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. ROTHWELL:

Q Dr. White-Stevens, you are one of the plaintiffs in this action, is that correct?

A Yes.

Q Can you hear me?

A Yes, I can hear you.

Q Could you state for us your present employment or occupation?

A Yes. I am a professor of biology at Rutgers University and Chairman of the Bureau of Conservation and Environmental Science.

Q Would you tell us a little bit starting from the days of your graduate study, something about your background and professional qualifications, Dr. White-Stevens?

A Well, I graduated from McGill University with my undergraduate degree of Bachelor of Science in 1933. McGill University is in Montreal, Canada, and my specialty was botany horticulture, plant pathology and related subjects. That's the study of plant diseases.

Then I continued at McGill University for my Master's degree as a graduate student working on storage diseases of crop plants.

In 1935 I had completed all my studies and virtually all my research, but I had not finished my thesis or dissertation, and I then had an opportunity to go to Cornell University as a candidate for the Doctorate degree, so I left Canada in 1935 and came to Ithaca, New York, and commenced my studies leading to the Doctorate, and while there I completed my thesis for the Master's degree which I received in 1936.

In 1937, although I was still a graduate student I was reasonably well along on my studies, so I was promoted to a full time staff member on one of the plant science departments at Cornell and sent to their research station at Riverhead, Long Island, and I continued full time work and also research leading to my Doctorate, which was, I admit, contiguous or coincident, and I completed the Doctorate at Cornell in 1942.

Q Will you continue, Dr. White-Stevens? What has been your occupation since?

A I continued on the staff at Riverhead and at Cornell, working part of the time each year at Cornell and the rest of the time at the laboratory and research farm at Riverhead, working on various problems relating to crop plants, control of diseases, control of insects, problems dealing with the nutrition of plants, the breeding of plants and so on, breeding for resistance, incidentally, to disease, and in 1946 I left Cornell University and joined the Hospital Bureau of Standards in New York as the Director of Research and Nutrition.

I would like to explain that the Hospital Bureau of Standards at that time at least was a concordance of some 360 hospitals that maintained an office here in New York--voluntary hospitals these were--all of them in the

United States and a few beyond the borders of this country.

They maintained this office on Park Avenue for the purpose of investigating new developments and equipment, pharmaceuticals, hospital supplies, and, of course, nutritional products, specialty products, for example, salt-free processed fruits, vegetables, sugar-free fruits for special hospital cases, which was my area of assignment and I worked with them for about three years.

Then I left and joined a company with headquarters in Cincinnati, Ohio, by the name of the Kentucky Chemical Industries Corporation, where I became their Director of Research and Development.

The Kentucky Chemical Industries was primarily a fat rendering concern, most of that product going incidentally to Procter & Gamble, which was in the next plot to where their plot was, but they also manufactured various food products, such as meat meal, for example, and later certain fat products.

So they got into the food business following the war and one of their areas of activity was the so-called Delmar Peninsula, that projection south of Wilmington, that includes virtually the whole state of Delaware, part of Maryland and a little bit of Virginia, and I was sent down there to conduct field research for them with their feed products and various other feed additives which were secured from different corporations, such as, for example, the American Cyanamid Company.

I was with them until 1952 studying animal feed supplements, mostly on poultry, and in 1952 a very interesting development had taken place. It had been discovered at Lederle Laboratories of the American Cyanamid Company that feeding antibiotics, something which had never been thought of before, to livestock, would improve their growth, reduce their susceptibility to disease, and I got very interested in this in the field while I was still with the Kentucky Chemical Industires Corporation, and as a result of my collaborative work with Lederle Laboratories, I was offered a position with the American Cyanamid Company at Pearl River, New York, to conduct research on the use of their particular feed additives which would include not only the antibiotics, but certain vitamins and certain medicaments or medicines which are useful in the production of the poultry industry.

I should mention perhaps that this was at the onset, this period, in the early 1950s, it was at the onset of the broiler explosion in this country. Up until that time chickens had been regarded as a luxury item, something to be used only on a Sunday occasionally, and as a result of our work and that of others, of course, there was a veritable explosion in knowledge on the feeding of chickens, the control of disease, the management and so on,with the result that enormous numbers of these animals were produced and spread through the country to the consumer level and the prices one might expect substantially dropped so there was an industry which simply blossomed, mushroomed within a decade from a luxury industry to an everyday industry that was recognized by urban consumers throughout the country.

Well, we played a very significant role in bringing this about and to this day poultry meat, of course, is cheaper than it was, relatively speaking, in terms of the take-home dollar, say, 25 or 30 years ago.

Now, all of this work, then, brought me into contact with the use of pesticides because these antibiotics and these various medicines that we use for animals were just as much pesticides in a sense as insecticides and fungicides that are used on plants.

We also used insecticides on animals and gradually as the years rolled by I was promoted within the company, first to Director of Plant Chemical Development in the Agricultural Division-- in those days it was called the Farm and Home Division. Later it became known as the

Agricultural Division of American Cyanamid.

Then I became Assistant to the Director of Research and Development of the Agricultural Division. By this time that division had been, at least the area in which I was working, had been detached from the Lederle Laboratories at Pearl River, joined with a segment of the company's operations from Stamford, Connecticut, and situated at Princeton, New Jersey, in a new farm research center and buildings that were developed there.

I was initiated into that operation. As a matter of fact, I was on the committee that selected the area in which it was located. I worked there until 1969 when I resigned and joined the staff of Rutgers University which is my present position.

Q Thank you, Doctor.

Did your former academic training include the subject of statistics?

A Oh, yes, indeed. I took quite a few courses, both as an undergraduate and as a graduate student and in the intervening years, of course, I have been working with statistical data.

I assume you mean analytical statistics rather than just the tabulation of data. I mean, the mathematical process of determining the reality of figures.

Q The significance of statistics.

A Yes.

Q Yes, that's what I meant, and your answer was directed to that?

A Right.

Q Could you tell us, do you have any connections with learned societies or organizations?

A Well, I am a member of almost more societies than I can recollect off the top of my head, but I am a Fellow of the American Association for the Advancement of Science. I am a member of the New York Academy of Sciences, the New Jersey Academy of Sciences.

I was for a while a member of the American Chemical Association, but their fees got out of reach for me and as my area didn't exactly relate to that, I dropped that, but I was a member also of the American Horticultural Society. I am a charter member of the Soil Conservation Society of America.

For many years I was a member of the Association of Official Agricultural Chemists. I am not any more. I am still a member of the American Plant Physiological Society, the American Society of Agronomy, the American Crop Science Society.

Q All right, Doctor. That's all. We will try to move along here.

A I have others.

Q That's all right.

Are any of these organizations which you have named involved in environmental causes or environmental concerns?

A Of course the Soil Conservation Society of America is directed precisely at this point -- long before the public in this country was aware or alerted to environmental problems, and I am speaking now back in the years when Hugh Hammond Bennett and Lowdermilk started this society in the middle thirties, when we had our dust storms which some perhaps may remember.

They were voices crying in the wilderness for the conservation of the natural resources of the country and it was then as a youngster I joined.

That one society, of course, and I kept up with it, is basically a conservation society concerned with the maintenance of our natural resources.

Other societies now, of course, are turning their attention towards this. This is true of the American Society of Agronomy, for example; the Crop Science Society of America; the Society of Avian Pathologists is another one that is concerned with these conservation measures, so I would say that almost all societies that deal with living things, the so-called biosphere are today concerned with conservation.

This has become the big modus or operational interest today among biological societies.

Q Jumping ahead a little bit, I want to get into the subject matter of this litigation which, of course, is the publication by The New York Times.

Will you start out, please, by telling us your first knowledge of this and what occurred on a chronological basis?

THE COURT: First knowledge of what?

MR. ROTHWELL: The publication by The New York Times of the August 14 --

THE COURT: You mean the August 14 publication?

MR. ROTHWELL: Yes, your Honor. Thank you.

THE COURT: All right.

A The first time I was alerted to the actual publication was when a graduate student said, "Hey, have you seen this?"

I think perhaps I should go back to the first time I was alerted that this might occur.

THE COURT: That is not the question. The question is: When did you first see it?

THE WITNESS: I saw it on August 14.

THE COURT: You mean on the day of publication?

THE WITNESS: Yes. It was brought to my attention by a graduate student who had seen it in the library downstairs.

THE COURT: All right. Now you say you had an indication that such a publication was going to occur?

Now why don't you tell us about that.

A On August 4, Friday afternoon, August 4, I got a call from Mr. John Devlin of The New York Times in which he introduced himself as a reporter of The Times and said, "Have you seen the recent issue of the National Audubon Society publication American Birds?"

And I told him,"No, I had not."

He said, "Well, there is a foreword in here which I think you might be interested in."

So I said, "All right. What is it?"

He said, "Well, let me read it to you."

Well, he read certain paragraphs. Of course, I not having it in front of me, I didn't know whether he read the whole article or not, but I don't think he did. I think he read certain paragraphs and in those paragraphs there was a statement to the effect that certain so-called scientists, and I am paraphrasing here, I don't have it in front of me, certain so-called scientists have been quoting the National Audubon Bird Count data to the effect that most species or many species of bird life in America are either maintaining their own over the past 25 years or so or have been increasing inordinately, and, therefore, they have been saying that pesticides, particularly DDT, which seemed to be the target, the bull's-eye, could not have caused an extinction of vast numbers of birds in America because the birds had not been extinguished.

He said this quotation says here that this is a lie with a self-serving interest and that the people who are pronouncing it are lying in the payoff industry.

I said, "That's very interesting, but what has that got to do with me?"

"Well," he said, "I have had an interview with the editor of American Birds, Mr. Robert Arbib, and he says that you and Dr. Jukes and Dr. Norman Borlaug and Dr. Gordon Edwards and Dr. Donald Spencer are the specific scientists to which this article refers. What do you think of that?"

I said, "Well, I am rather staggered."

I said, "It is not true."

THE COURT: When you say, "it is not true," what is not true?

THE WITNESS: The statement that these five people, or at least as far as I was concerned, are liars in the payoff industry.

I said, "In the first place, I don't work for industry any more. When I did work for industry, they certainly didn't pay me to lie, and I haven't worked for industry now for three years," and I said, "I don't even own any chemical stock any more."

I did own some stock when I was with industry, with the American Cyanamid Company, but I got rid of that when I resigned and took my position at Rutgers just to avoid any possible such accusation, but anyway, he said, "Well, this is what they say."

Well, of course, it is one word against another.

I said, "First of all, why don't you call the other four members that are mentioned here, and I would be glad to give you their addresses and phone numbers," which I had, except for Dr. Borlaug. I recall I didn't have his phone number and knowing that he was associated with the Rockefeller Foundation, I suggested to Mr. Devlin that he contact the Rockefeller Foundation in New York and through them he would probably be able to track Dr. Borlaug. The others I did have and I gave Mr. Devlin those phone numbers and addresses.

I also gave him the numbers and addresses of a number of other equally eminent scientists that are familiar with this field, the field of pest control, agricultural chemicals, conservation, and the like, around the country, and in many cases was able to give their phone numbers as well, but not in all cases.

I also indicated the areas of expertise that these particular people could comment with precision and with reliability.

We had quite an extended conversation. I would say that it extended at least three-quarters of an hour, perhaps longer, and it was a very amicable one.

He said, "Well, what do you thing about this?"

He said, "Do you think we ought to publish this?"

I said, "Of course, I am not going to tell you what you should publish or what you shouldn't publish, but it does seem to me that you should check on this thing rather carefully to make sure that the statements that apparently had been offered to you by the National Audubon Society are in fact true."

I said, "I realize that there is freedom of speech in this country and it is a free country, but there are such things as libel and as far as I am concerned, such a statement is slanderous and scurrilous and," I said, "I would resent it very strongly, but I am not going to tell the prestigious New York Times what they should or should not publish."

He said, "We would like to publish the other side of the question."

I said, "That's good."

He said, "We have an Op Ed page. Would you write a short article, maybe 700, 1000 words for our Op Ed page?"

I said, "I would be delighted."

He said, "Perhaps you would like to write a more extensive article on the positive side of pesticides for our Sunday Magazine section."

He said, "Are you familiar with that?"

I said, "Yes, my wife and I have taken The New York Times for 35 or 40 years, the Sunday Times, and we invariably do read the magazine section, and I would regard it as a privilege to have an opportunity to write such an article."

He said, "I will make arrangements for you to do this."

I said. "All right."

On a very amicable note we closed.

I thought it over and the more I thought it over, the more troubled I became, and so I right then on rather late Friday afternoon, August 4, I sat down and wrote a longhand letter on a yellow pad for my secretary to type up on Monday.

That letter was finally typed and issued, I think, on the 8th, which would be Tuesday, I guess, 8 August, and forwarded to Mr. Devlin,in which I recapitulated our discussion and included the list of other scientists that would be able to confirm what I had stated, or at least if not confirm, comment on it along parallel lines.

I heard no further from Mr. Devlin. I had no further correspondence with him and I had no further phone calls.

However, I found that he did follow up my advice and called at least one other member that was listed among the five, Dr. Jukes, who called me over the weekend about the matter and we discussed it and I said, "He didn't say he was going to publish it and certainly he is entitled to have an interview with any member he chooses. It was purely a conversation."

So I said, "I don't think that we should get alarmed or excited unless an actual libelous publication appeared."

Well, I watched The New York Times after that, the following week, rather assiduously. I don't read it every day, I don't always have time, but I went down to the library every day for about a week and it wasn't there, so I decided, well, evidently Mr. Devlin had thought better of it and had checked around, or perhaps he was still checking around, but in any case, it didn't appear.

The very day I didn't bother to go down for reasons of other pressure it did appear and that's when the graduate student brought up to me or drew my attention to it and said, "Hey, what's this?"

So this was on August 14.

Q Dr. White-Stevens, I am going to hand you an exhibit that has been admitted as Audubon Exhibit No.Z. This has been admitted into evidence. However, I would like to have you identify that.

A This contains the original letter that I wrote to Mr. Devlin and also includes a number of publications. I enclosed, let's see, three, six, eight publications that I had written on the subject of agricultural chemicals in relation to bird life and other aspects of the environment.

I had enclosed those in this letter along with a rather extensive list of names-- it must be 15 or so names of people to whom I had thought he might wish to refer to get other points of view.

I recognize this as that correspondence.

Q That was mailed on what date?

A That was mailed on August 8.

As I say, I got no reply. It was in here I think that I made the statement that -- yes.

"Finally, I will be glad to prepare an article for the magazine section of the Sunday New York Times or a short Op Ed statement for your consideration and that of Mr. Harrison Salisbury," who I believe was editor of the Op Ed page at that moment.

Q I want to stay with this 45-minute conversation with Mr. Devlin that occurred on August 4 for just a few moments.

In looking at that exhibit in front of you, Dr. White-Stevens, does that suggest to you any other things that you and Mr. Devlin discussed during that conversation?

A Well, we did range over the whole subject of agricultural chemistry in relation to maintaining the food supply for an exploding population around the world and I drew to his attention, I recall, and that's one of the papers that's in here, World Food Production Potentials, which I published for the American Chemical Society, by the way, I drew to his attention that there is no way at the present time and in the foreseeable future in which it will be possible to even feed the population of the United States and clothe and shelter them and protect their health without the use of these useful chemicals. Although, obviously, no farmer, no conservationist, no biologist was interested in destroying, deliberately destroying bird life or any other kind of life, or destroying the natural resources because this obviously would be self-defeating; nevertheless, the first function of conservation must necessarily be the conservation of the human race, the conservation of man, and all of those aspects of the environment which relate to the conservation of man.

I said in that sense, and I was obviously trying to be funny, I said in that sense, "I am a racist, an ardent racist" beause I believe in the human race first.

I said this doesn't mean to say that I turn my back on all living creatures, but I look upon living creatures perhaps with the old-time, so-called Judeo-Christian ethic that man is the dominant species of life on earth, but anyhow, we joked about this and we got into the discussion of many aspects of the whole agricultural chemical business.

I made it very plain to Mr. Devlin that although there was considerable interest in ultimate methods of controlling these pests which threaten our food supply and our domiciles and our very persons,for that matter, continually enhanced as time began, although there are ultimate methods that we are trying to develop, things like breeding for resistance, biological control, setting a thief to catch a thief, so to speak, these methods are so completely inadequate in terms of total availability.

For example, there are at best one hundred --

MR. AGOGLIA: Judge, is he lecturing now or telling us his conversation?

THE WITNESS: I am talking about my conversation.

THE COURT: He is talking about his conversation.

MR. AGOGLIA: OK.

THE WITNESS: I had, counsel, quite an extensive conversation with Mr. Devlin. As I said, it was 45 minutes, at least.

MR. ROTHWELL: Thank you, Mr. Agoglia.

Q The subject matter that Mr. Devlin was calling you about was this Audubon article he read to you and was there any talk about bird count?

A Yes. He raised the question. He said, "Of course, the apparent increase in bird numbers, Mr. Arbib tells him is not due to an increase in the number of birds;

it is due to an increase in the number of people that are out counting birds."

I said, "Yes, we recognize that point and there has been a substantial increase as reported in the Audubon field notes for the period concerned in the number of observers that are involved in the count. However, there are two points here that should be recognized.

"One is that it doesn't matter how many observers are present. If there are no birds present, their count is zero and unless people deliberately go out to count the same bird ten times over, there obviously has got to be a reasonable abundance of birds in order for such numbers to appear regardless of the number of people that are out counting them," but I said, "In any case, in the data which I discussed in public, we discounted this by calculating the number of birds per observer, so we took into consideration the increase in the number of observers as well as the increase in the number of birds, and under such circumstances, the numbers substantially increased per annum over the period 1940, say, to 1960."

I said, "I will agree that we probably do not have sufficient data, or there are so many variables involved in the accumulation of this data that it is questionable as to whether these constitute a statistical significance; that is to say, a real increase during that period. It could be an apparent increase which is not significant in the mathematical sense. I won't go into the details of how we establish that," but I said, "one thing we do have to include and that is that it surely must reveal there has not been a significant decrease because obviously numbers that have increased can't be regarded as revealing a significant decrease."

So I said,"My point, then, is not that there has been a significant increase of the number of birds, even though the count has gone up none-fold per observer; it does suggest that there has not been a significant decrease which the public has been led to believe has occurred and has been due to pesticides."

Q You speak of this data. What data specifically are you referring to?

A Well, the calculations that I made over the 20-year period from 1941, I believe it was, or 1940, to 1960 or 1961, were taken from the published annual Christmas Bird Count Data of the National Audubon Society.

In 1940 the rough notes per area were just published without any tabulations at all and so we had to make the rather tedious job of assembling these together for different species, but in the 1961 publication happily the National Audubon Society itself published in their field notes the summations indicating the numbers of birds of each species which were recognized and also the total number of observers present.

That's why it seemed strange to me when Mr. Arbib told me -- when Mr. Devlin told me, I beg your pardon, that Mr. Arbib had told him that it wasn't possible to summerize these figures because it was just really a game, an enjoyable outing. I think the term he used was "bird golf" and that it wasn't possible to summarize, that this was merely a casual observation of the bird counts as they occurred each Christmas across the country by people who are enthusiastic outdoors men and women and bird counters.

I said, "But I didn't make the summaries in the latter years, they were made by the Audubon Society itself and published as such. Are you telling me that when I make the summaries they are invalid, but if the National Audubon Society makes the summaries, they are valid?"

He said -- we joked about it, you see.

Q Dr. White-Stevens, I hand you an exhibit, Plaintiff's Exhibit 2, American Birds, the April 1972 issue, which has been admitted in evidence in this case, and I ask you other than the foreword, of course, does that book contain the kinds of statistical tabulations on which you relied to work up your statistical data, statistical analysis?

A This book -- I might say that in the latter years they refrain from publishing summaries. I don't know whether it was because of this altercation that developed, but anyhow --

MR. AGOGLIA: I didn't hear that. I move, I think, to strike that he doesn't know. It may be mere speculation.

May I ask your Honor to instruct the jury to disregard that, please.

THE COURT: I don't understand that the jury has to be instructed to disregard it. He is merely giving a statement.

MR. AGOGLIA: He is not allowed to speculate what he thinks might have been why we did this or didn't do that. That is not probative evidence. He is speaking about our -- I don't understand.

THE COURT: He is being asked about this volume.

MR. AGOGLIA: But he talked about changes which he thought might have been done because of this altercation, I think is the word he used, or something such as that.

THE COURT: Does this volume reflect the statistics?

THE WITNESS: Yes, the raw statistics, your Honor, not the summary.

THE COURT: Why don't you listen to him?

MR. AGOGLIA: I have listened very carefully, sir.

THE COURT: Then sit down and listen more carefully. He said that volume contains the statistics --

MR. AGOGLIA: He said --

THE COURT: He said that volume contained the statistics.

MR. AGOGLIA: Thank you.

Q Dr. White-Stevens, how long had you been involved in that activity of putting together statistics relating to this subject matter of bird counts?

A Well, actually it was during the period of 1962 to 1963 or 1964 and then in a desultory way up through 1967 or 1968. I had not in recent years concerned myself with this particular data. In other words, I haven't been following it up to this most recent volume that you have produced.

THE COURT: That is not the most recent. That is 1972. That's four years ago.

THE WITNEYS: Well, I didn't even study that one, your Honor, and I have not studied them since that time. I was concerned primarily for the period 1940 to 1962.

Q That's the period that you directed your attention to?

A Right.

Q What I want to know is what period did you do the work?

A At the time, 1962, 1963, 1964. As I say, occasionally I worked on some other data in the Hawk Mountain Sanctuary as late, I think, as 1968.

Q This other data you speak of, what is that?

A We-l, the Hawk Mountain Sanctuary is a place on a mountain in Pennsylvania not too far from Doylestown on the Allegheny Ridge. It happens to be a very strategic spot for bird watchers because it is on the north-south flyway, particularly for hawks. Hawks are very interesting birds in that they are said to be at the top of the food chain and for this reason --

Q Would you explain that, the top of the food chain?

A Yes. Everything in life must necessarily feed upon some other living creature. This is a situation that life is saddled with. All the way from the lowliest creature up to man. If you study the dietary of creatures, you will find that they feed on something which feeds on something which feeds on something and it goes all the way down the line until you come to the primordial living organism which we presume must have been an algae.

Now, algae are single cell --

Q That's what you call the food chain?

A Yes. If a chemical is introduced into the environment of the lowest member on the food chain, in this case these green things that we regard as green slime on a still pond, for example, these are living creatures and they are able to exist without actually feeding on some other living thing.

Of course, most of the plants can do this, too, but all animals must live on something that is in itself either alive or has at some time been alive.

Now, the primordial plant, the algae growing in plants will serve as a source of food. It gets its energy from the sun, it gets gases from the asmosphere, nutrients from the water, and it makes itself in this manner by a process which is called photosynthesis and becomes food.

Then little creatures will feed on this and other creatures will feed on that and so on all the way up through shrimp and small fish and big fish and ultimately to man.

Now, way up this ladder, then, are the so-called hawk birds. Therefore, any chemical that might get into these primordial organisms, these first-stage organisms, and be accumulated by them, and then accumulated by the next species, and so on, would tend to magnify or to accumulate and concentrate until it reached the stage where the animal at the top of the chain, theoretically, could be injured by this so-called biological magnification.

This is a very interesting theory and it is hotly debated, but the facts of the matter are that this thing goes up and it goes down. Some magnify and some don't, and so on, but there is in general an increase in the so-called magnification and because of this the hawk birds are particularly interesting and many scientists have paid attention, directed their attention to the hawk birds to see whether or not they are seriously declining in the United States and trying to relate this to the possible use of chemicals for agricultural and other purposes in the field.

So I addressed my attention to these counts at the Hawk Mountain Sanctuary because it has been going on for over forty years.

Q Overhow many years, sir?

A At least forty years I would say.

Q Thank you.

A And there were a few years during World War II w-en they suspended operations for other reasons, but this is a pretty good estimate from year to year of the fluctuations that occur. Of course, there are many things that can affect the fluctuation and it becomes very difficult to try and relate this to any cause and effect relationship because there are so many causes which may end up in a common effect, but in any case, I did study this particular matter and came to the conclusion that the evidence was not sufficiently powerful to allow one to include with any sense of decision and precision that the hawk birds had been destroyed by in this case DDT or any other particular chemical, although there are some that are coming into the picture now which are still under suspicion.

MR. AGOGLIA: Still under what?

THE WITNESS: Suspicion.

Q Incidentally, American Cyanamid and that other company you worked for, did they make DDT?

A No.

Q I hand you Plaintiff's Exhibit 6 marked for identification, which is a seven-page document, and it is entitled "Pesticide Influence on Bird Population" and under the by-line of Philip H. Marvin, and ask you if you can identify that, sir.

A Yes, I have seen that before.

Q Can you tell us what it is?

A Philip --

THE COURT: Before you do that, offer it in evidence.

MR. ROTHWELL: I will offer it in evidence.

MR. COURT: Mr. Abrams?

MR. ABRAMS: I have no objection.

MR. AGOGLIA: May I just see it a moment?

I object to this.

THE COURT: On what ground?

MR. AGOGLIA: I object on the ground it is a report of a gentleman named Philip H. Marvin and it is the rankest sort of hearsay.

THE COURT: Let me see it.

MR. AGOGLIA: This is a copy, your Honor, a photostat.

THE COURT: Counsel come to the bench.

(At the side bar)

THE COURT: What is this being offered for?

MR. ROTHWELL: The witness relied upon that and that occurred early in his career as a statistician working on this subject of bird count, your Honor.

Mr. Marvin will appear here as an expert witness, but Mr. White-Stevens, Dr. White-Stevens had worked from Marvin's work product.

THE COURT: If he is going to appear, I will take it subject to connection.

MR. ROTHWELL: Subject to connection. Thank you.

(In open court)

xx (Plaintiff's Exhibit 6 received in evidence)

Q The question was, Dr. White-Stevens, can you tell us what that is, Plaintiff's Exhibit 6?

A This is a statement entitled "Pesticide Influence on Bird Population" by Philip H. Marvin, who is the interesting combination of an entomologist, a qualified entolomogist and an ardent member of the Audubon Society, as I understood it at the time, and an ornithologist of some merit.

In the fall of 1962 I first became acquainted with Mr. Marvin. I at the time had to give a speech at the University of Minnesota for a conference there, a scientific conference, on the subject --

MR. AGOGLIA: I object to this, any conversations or communications between he and Mr. Marvin outside the presence of my client, as in no way binding on my client.

THE COURT: We are not interested in the conversation you had with Mr. Marvin.

The question is, when did you meet him?

A I met him in I think it was November 1962 and he drew my attention to these Audubon Bird Count Data. At that point I had no idea --

Q But in terms of your connection with that Exhibit 6, did you see that data?

A I don't know whether I saw this particular manuscript because he brought a sheetful of calculations and data with him which I looked at and subsequently went home and studied and reviewed myself with the original publications.

Q I show the witness Plaintiff's Exhibit marked for identification No. 16, entitled "Birds on the Rise" by Philip H. Marvin and offer this in evidence.

MR. AGOGLIA: I object, if your Honor please.

THE COURT: The same ruling.

Any objection, Mr. Abrams?

MR. ABRAMS: No, your Honor.

xx (Plaintiff's Exhibit 16 received in evidence)

A Yes, I have seen this before. As I remember it appeared in a publication of the Entomological Society of America. I think it was either in the Entoma, which is one of their publications -- they put out several -- or it was in the Bulletin of the Entomological Society of America, I am not sure which.

He again presents changes in the bird count from 1949 to 1962 for a number of different kinds of birds and shows in general that there was rather substantial increase over that period.

I don't recall his conclusions other than they were the same as mine, that the data did not reveal there being a substantial decline in these species of birds.

Q Did your conclusions in terms of changes in bird populations generally, did they conform with the conclusions as published in that Plaintiff's Exhibit 7?

A Essentially, yes.

Q Essentially, yes. Thank you.

A It may have been slight numerical differences because we didn't always study the same years, but the general trend over the period involved was coincident.

Q Picking up now, Dr. White-Stevens, occurrences following the publication of the August 14 article, you had commenced testifying that this was brought to your attention by someone at the university.

Will you please continue with that?

A Yes. When I heard about it, of course, I rushed down to the library and read it myself and photocopied it and took it back upstairs. I was really quite astonished and a little disappointed in the fact that I felt that even if Mr. Devlin had decided and his editors had decided to go ahead and publish, it did seem to me that in all fairness they should have published at least some of the information that I gave them which was quite extensive.

I recall when I was talking to him on the 4th of August, he kept stopping me and said, "Just a minute, just a minute." Evidently he was writing this down and I would stop and respell names and this sort of thing, so I assumed that over the 45 minutes he must have taken rather extensive notes of what I had said.

MR. ABRAMS: Your Honor, I move to strike so much of the witness' testimony about what he assumed Mr. Devlin was doing.

THE COURT: Sustained.

A I therefore was rather disappointed that he in his rather short article in The Times completely ignored anything that I had told him. I was rather convinced that he couldn't have conferred to any extent with the people I suggested because their opinions were not involved and present either.

MR. ABRAMS: Your Honor, I object to so much of the testimony as to what the witness was convinced other people might have thought Mr. Devlin might have done.

THE COURT: He said he did check with Jukes and Jukes said he was interviewed by Devlin and there is no reference in the article to Jukes' statement and there is no reference in the article to his statements.

MR. ABRAMS: There are references --

THE COURT: I will allow that in.

A So then I sat down and on I guess that day, but it didn't go out until the 15th, I then wrote Mr. Devlin a rather extensive letter in which I pointed out that we had calculated the changes in birds per observer, not total birds, and therefore had taken into consideration the number of observers as well as the number of birds.

I also gave him, as I remember, the calculations of the Hawk Mountain Sanctuary data and also all the tabulations that I had ever used in slides of the National Audubon Christmas Bird Count Data through the period 1940 to 1961.

I mailed that all to him.

Q I show you Plaintiff's Exhibit 19 which is on the stationery of Rutgers University --

THE COURT: Just show it to him and ask him to identify it.

Q Please identify that, Dr. White-Stevens.

THE COURT: Is that the letter you claim you wrote?

THE WITNESS: Your Honor, this is the first original copy and attendant enclosures -- I am checking it to make sure-- of my letter to Mr. Devlin, dated August 14, 1972, in which I discussed his article that appeared the preceding day.

THE COURT: Any objection, Mr. Abrams?

MR. ABRAMS: Yes, your Honor. I object to the letter and to the testimony. It is all after the alleged libel in question. It is not a demand for a retraction as a matter of law and it is self-serving in the extreme.

THE COURT: I have to sustain that objection.

Let me see that.

(Pause)

THE COURT: Go ahead.

Q Dr. White-Stevens, turning to the subject that has been described in general terms as the underlying DDT controversy, you played a role in that, did you not?

A Yes, I would say I did.

Q When did that commence?

THE COURT: Let me see counsel at the bench.

(At the side bar)

THE COURT: That is the point of this testimony? You are just broadening the issue in this case?

MR. ROTHWELL: No, your Honor, Audubon malice.

THE COURT: Malice as defined in The Times case is not the malice that you are talking about.

MR. ROTHWELL: Your Honor, intent -- well, you know the language as well as I do. Intent to state a falsehood or a wilful disregard as to whether the matter is true or not.

THE COURT: No, The Times testimony is that they knew it was false and the answer to this question is not going to show that they knew it was false or utter disregard of the truth or falsity.

The mere fact that he was involved in a controversy doesn't prove utter disregard of truth or falsity.

You are opening the door to all the stuff I am trying to keep out of this case. We will behere for two weeks trying this case.

MR. ROTHWELL: That is what I don't want.

Thank you, your Honor.

(In open court)

MR. ROTHWELL: May I have one moment, your Honor?

THE COURT: Yes.

(Pause)

MR. ROTHWELL: I have no further questions of this witness.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. AGAGLIA:

Q Dr. Stevens --

A White-Stevens.

Q You prefer to be called White-Stevens?

A Yes, it is a hyphenated name, counselor. White-Stevens.

Q Would you forgive me, sir?

A Certainly.

Q In this case, in your complaint, do you charge the Audubon Society with making rash statements about you and the other plaintiffs to encourage or enhance the number of membership and to gain economically by it?

A I don't charge that, no.

THE COURT: Just answer: Do you charge it? And you said, "No"?

THE WITNESS: No, I don't charge that.

Q Did you, through your lawyers, make such a charge in this case?

A I --

Q If you know, sir. If you know.

A I can't answer that. I haven't read the charge recently.

Can you not hear me?

Q No.

I can hear you now. I have to get a bit closer. I have a bit of a problem hearing.

A I can raise my voice if it is all right with you, your Honor.

THE COURT: It is all right with me, but you have a very deep voice and you might push us all out of the courtroom.

Q May I ask this of you, sir, if you had made such a charge, would you say there would be no basis, according to your personal knowledge, for such a charge?

A Counselor, that would be pure speculation on my part. I know nothing about the membership drive of the National Audubon Society, so I would be making a futile and wild guess to answer that question either yes or maybe.

Q Did you make the following charge in this case:

The defendants -- and I am now referring to the individual members of the Audubon Society -- as paid employees of Audubon have strong self-interests in discrediting members of the scientific community, including plaintiffs herein who raise questions as to validity of Audubon's claims and warnings about potential ecological disaster.

Did you make that charge?

A I would agree with that charge, yes.

Q Did you make the following charge:

Audubon has publicly proclaimed that its object is quite literally to save the world.

Do you agree with that?

A Yes. I have seen such advertisements.

Q Do you agree with this:

In addition, Audubon has substantially increased its membership and income during the period 1962 to 1972 which increases are attributable to said organization being the sponsor of scare-mongering campaigns.

Do you agree with that?

A I will agree with the first part which says that their membership has increased because I have seen such published figures.

I would not presume to interpret how it increased.

Q So you would not agree in toto with your charge, would that be a fair statement?

THE COURT: To that portion of the charge.

Q To that portion?

A To that latter portion, I have no idea whether it is true or not.

Q When your lawyers showed it to you and before you signed or verified it, did you make inquiry of your lawyers as to the accuracy of this information?

A Yes. I think we reviewed it rather carefully.

Q And did they give you any statistics to review or analysis?

MR. ROTHWELL: Your Honor, I object to this line.

THE COURT: Sustained.

Q Doctor, you sent to The New York Times on August 8 what we call Exhibit Z, as in zebra, eight articles; did you not, sir?

A I believe I did.

Q Were each and every one of these articles written for the chemical industry?

A Oh, no.

Q Let's take the first one. It was presented before the Annual Meeting of the American Chemical Society, Division of Petroleum Chemistry, September 8-12, 1969, Waldorf-Astoria Hotel, New York, New York.

A That one was writtenfor the chemical industry, but it was open to the public.

Q We will go through it seriatim, sir. All right?

A Certainly.

Q The second one is "Into the Future with Agricultural Chemicals."

For whom was that written under your by-line?

A I presented that in a number of places, but I have presented that mostly to lay audiences.

If you read the article, counselor, you can see that it is not technical like the first one that you mentioned.

Q Your counsel has asked me to hand you this so you can follow; OK?

A Yes.

Q You wrote one for Clipper Magazine, right?

A Right.

THE COURT: Are we still on the second one or are you finished with that?

MR. AGOGLIA: Finished with that, sir.

Q The third one, Clipper Magazine.

A Yes.

Q For whom was that magazine published?

A That was for the Pan American Airways. They called me up and said they had a house organ which they stashed into the pockets of the seats in front of everybody on their planes all over the world and would I write an article on pesticides: friends or enemies, things of this kind, which I did.

Q Which you did?

A I might say, counselor, that this is a condensation, essentially, of previous articles that I had written. In other words, I culled relevant information that I felt might be interesting to a lay audience.

Q Did you think the following statement in that article would be interesting to a lay audience or were you advocating a position?

Listen to the statement, sir:

"Concern over the impact of pesticides upon terrestrial wildlife, particularly birds, is not entirely void of justification but again it has been exaggerated, out of all proportion to actual facts."

A Yes, I would agree with that.

Q You would agree with that?

A Yes.

Q Do you agree with this statement, sir:

"Despite the emotional and sensational assertions in the American press, there is actually no valid evidence that any registered pesticide applied correctly has ever invoked massive, irreversible bird kills of any species."

A I would agree with that again.

Q When was this written, sir?

A I think it was written around 1972, or obviously before August 1972.

Q It certainly was written after the federal government had said they are going to ban DDT?

A No. It was written before that.

Q When was the ban, sir?

A The ban, it seems tome, did not take effect until 1973. Now, I could be wrong there. It might have occurred in 1972, but this article was written before the ban. Of that I'm certain.

Q This was written before the ban?

A Yes.

Q And this is February of 1972, right?

A Right.

Q At least that's what the date says.

THE COURT: That's the date of the publication. It couldhave been written months before.

THE WITNESS: It was written before that, your Honor, too. It was written in the fall of 1971, most of it.

Q I see.

A May I add that the ban-- I could be wrong here, but it seemed to me the ban occurred in-- it was either June 1972 or 1973. I thought it was 1973, but I could be wrong in that.

Q The next one in the articles is "The Role of

Pesticide in Food Production and Health," Robert White-Stevens, American Cyanamid Company, Princeton, New Jersey.

A I obviously wrote that before 1969 when I left the Cyanamid Company,and as I recall, this was written for an extension series of meetings held by the United States Department of Agriculture at the Texas Agricultural and Mechanical College at College Station, Texas, in various areas, so they have to hold their meetings in five or six areas, so this was essentially the paper that I gave down there.

Let me also, if I may, counselor, add that I do not lecture by reading a paper. I ad lib, but this is the essence of what I said.

Q For example, the next one is also, I assume, the essence of a speech. It is entitled "The Facts and Fallacies of Silent Spring"; by Robert White-Stevens.

A Yes. That was written in the fall of 1962.

Q Was that a personal attack upon the author of that book, "The Silent Spring"?

A No. It was not a personal attack upon the author.

Q That answers my question. We will go into that in detail right now, sir. If you will just bear with me for a moment; would you, Doctor, please?

A Yes.

MR. ROTHWELL: I object to this line, your Honor.

THE COURT: I will have an offer of proof at the bench.

(At the side bar)

THE COURT: What is the offer of proof?

MR. AGOGLIA: The offer of proof goes to the witness' character, reputation, and I intend to establish through this article that he has made personal attacks upon another biologist, and I will go -- I will also go into the issues of his credibility since I will read from depositions where he has stated he does not personally attack or attack ad hominem, and therefore I respectfully submit it is valid on all those grounds.

THE COURT: I will refuse the first ground.

I will allow only inconsistencies with the depositions.

MR. AGOGLIA: May I ask you a question, please?

THE COURT: Yes.

MR. AGOGLIA: Would your Honor accept it on the question of damages and character?

THE COURT: No, it is not the way you prove it. You better check your law.

(In open court)

Q Doctor, do you remember being examined before trial on the 19th of December, 1973?

A You mean my deposition?

Q Yes.

A Yes, indeed.

Q Do you recall testifying that you were not a man who would engage in --

THE COURT: Give the page, line number, and then read question and answer.

MR. AGOGLIA: I want to --

THE COURT: I don't want that. If you are going to refer to it I want the exact words.

Q Doctor, were you asked at page 88, line 12, the following question, and did you give the following answer:

"Q Doctor, would you in your own mind differentiate between the use of the word 'liar' and the application of the term 'quite false' to someone's speech?

"A Yes. Because the word 'false' -- probably,I don't know what context, to what you are referring, but it is a question of interpretation of evidence."

"For example, I have contested interpretation of thin shell egg data in which I conclude that the conclusions of another party are in fact false. While I am not calling him a liar, but I am arguing about his interpretation of this data.

"Perhaps we are not defining the word 'liar' in the same way. Perhaps the point of departure is here."

Do you remember giving that answer?

A Yes, I do.

Q Do you agree with that?

A Yes, I would.

Do you mean do I still agree with it?

Q Yes.

A Yes.

Q The following question:

"Q Would you say, sir, that the discussion of the DDT problem is a presently hot controversy?

"A It of course has subsided in the last few months, but I expect it is going to rearise and I would say in answer to your question, yes, it is still a hot topic of controversy."

Do you agree with that, sir?

A Yes.

Q Do you still agree with that, sir?

A Yes.

Q Fine.

Doctor, just for a moment, do you recall your article, "Into the Future of Agricultural Chemicals"?

A Yes.

Q I am at page 90, line 9:

"Q In an article entitled "Into the Future of Agricultural Chemicals," you state "The recent clammer is generally a gross distortion of the actual fact, completely unsupported by scientific evidence or practical evidence in the field.

"Would you classify that as an ad hominem argument?

"A I am not referring to a particular person, but am discussing a scientific matter without any reference to a particular individual."

Do you stand by that answer?

A Yes, indeed.

Q So long as there is no mention of a particular individual, you don't consider it personal invective; would that be a fair statement?

A Let me answer that --

Q Would that be a fair statement?

MR. ROTHWELL: Let him answer the question.

MR. AGOGLIA: I am asking first whether it would be a fair statement. I am entitled to a yes or no.

A No, that would not be a fair statement because it does not embrace my answer.

Q Would you tell me what you mean by "ad hominem"?

A I mean ad hominem --

THE COURT: Wait a second. You put the question ad hominem, not him.

MR. AGOGLIA: I am asking him what he means by it so there is no confusion.

THE COURT: That isn't the way you put the question. You said, what do you mean by -- as though he said ad hominem.

What do you mean by ad hominem?

MR. AGOGLIA: That's the question, sir.

THE COURT: You are the one who put the question.

MR. AGOGLIA: So I am asking him now what does he mean by ad hominem.

THE COURT: You are asking what does he mean as though he used the words. What do the words ad hominem mean to you?

THE WITNESS: The words ad hominem, your Honor, mean to me,they are directed at a specific individual, the argument is directed at a specific individual, from the Latin, and not the facts.

THE COURT: Thank you.

Q I am going to refer to the article of yours entitled "The Facts and Fallacies of Silent Spring" by Robert White-Stevens. OK, sir?

A Right.

Q That article which is in evidence as Exhibit Z, part of Exhibit Z, as in zebra, you wrote concerning or your analysis of the book by Miss Carson, "The Silent Spring"; would that be correct, sir?

A Yes.

Q Would that be sort of the jump-off point of your involvement in the DDT controversy?

A Well, it certainly accelerated at that point. There had been argument about the use of pesticides and DDT specifically long before Rachel Carson.

Q Did you say the following, sir, in your article-- and I am referring specifically to Miss Carson and her book -- did you say the following --

MR. ROTHWELL: Your Honor, I renew my objection to this same line of questioning.

THE COURT: Sustained.

Q Sir, did you ever attack her personally in an article?

A No.

MR. ROTHWELL: Your Honor, objection.

THE COURT: Sustained.

Q Did you ever charge her with gross--crass assumptions and gross misinterpretations and misquotations?

MR. ROTHWELL: Your Honor --

THE COURT: Sustained. Stop this line of questioning.

MR. ROTHWELL: Thank you, your Honor.

MR. ABRAMS: Your Honor, may we approach the bench, please?

THE COURT: You may.

(At the side bar)

MR. ABRAMS: This may be premature, but your Honor's ruling has an effect on my cross-examination as well. I think it is very relevant for us to be entitled to go into the kind of language used by this witness in this entire area.

I think without being able to do it, the jurors cannot understand damages, for one thing, in terms of how much of being called a liar.

THE COURT: I will not allow it in on a theory of damages.

Next point.

MR. ABRAMS: I would like to give one example, if I may, your Honor, because I do want to be clear that that's what's being ruled out.

I would have intended to cross-examine the witness to bring out to the jury that he has used words such as quack and witch doctor and a variety of other terms accusing other members of the scientific profession of something which is no worse or better than being called a liar.

I think it goes not only to damages, I think it goes to understanding --

THE COURT: The application is denied.

MR. AGOGLIA: May I be heard, your Honor?

THE COURT: You have been here and been heard before.

MR. AGOGLIA: Judge, please don't be short with me. I am only trying to get at the truth here.

THE COURT: That is what I am, too, but you don't follow my directions.

MR. AGOGLIA: Would you hear me out, please?

THE COURT: This is the first time you get two cracks at the bat. Normally you only get one.

MR. AGOGLIA: You are very kind, I appreciate this.

THE COURT: You keep saying this all the time. Please stop this in the courtroom. You tell the witness he is kind, you tell me I am kind, you accept my rulings with kindness. I don't stand for that in my courtroom.

MR. AGOGLIA: I didn't think it was improper, but forgive me, I won't do it any further.

May I ask this of your Honor? I thought I understood your Honor yesterday to say that we could prove, and based upon your Honor's statement, I was pursuing this line of inquiry.

THE COURT: I didn't say you could prove it. I said I would take it one by one. I now see what you are trying to prove and I am ruling it out.

MR.AGOGLIA: I thought you were very clear yesterday that you were going to allow us to prove statements by the witness himself, not what someone else --

THE COURT: I did not. The record shows that I said you would take it one by one and I would rule on them one by one. You are now offering it. I am ruling it out. There is nothing inconsistent with what I am doing now with what I said yesterday.

MR. AGOGLIA: What I am reading from is in evidence. The jury can read it, but I can't read it, sir?

THE COURT: I will not let you use this as a means of bringing out that he previously called somebody a quack.

MR. AGOGLIA: Not a quack. It is much stronger.

THE COURT: I don't care what it is. I think my ruling is clear, isn't it?

MR. AGOGLIA: Yes. All right, sir. Gee whillikers.

THE COURT: Stop arguing. I have ruled. You have made your point. I have ruled. If we don't continue, we will be here all week.

MR. AGOGLIA: I am just trying --

THE COURT: You made a record and I ruled. That's the end.

MR. AGOGLIA: Thank you.

(In open court)

THE COURT: We will have a recess.

(Recess)

Q I am going to read from your examination before trial, Doctor, and ask you if you were asked the following question and did you give the following answer:

THE COURT: For the record, what page are you reading from?

MR. AGOGLIA: Page 77, line 3.

"Q Would you say it is a consistent practice of yours to avoid ad hominem argument?

"A Absolutely."

Were you asked that question and did you give that answer?

A Yes, I would give it again.

Q Would you consider the use of the word "calumnious" --

A I beg your pardon?

Q "Calumnious"; would you consider the use of that word to be an ad hominem approach or attack?

A You mean directed to the specific individual?

Q Yes.

A Yes, I suppose so.

Q Did you use that word in attacking Miss Rachel Carson?

MR. ROTHWELL: Your Honor--

THE COURT: Sustained.

Q Would you consider the statement that an accusation by an individual was utterly untrue to be an ad hominem attack?

A I don't follow your question, counselor.

Q If you said of someone that a statement or accusation of that person wasutterly untrue, would you consider that to be an ad hominem attack on that person?

A No.

Q You would not?

A No.

Q Is something that is utterly untrue, would that be a lie?

A No.

Q There is a difference between a lie and something utterly untrue?

A Right.

Q Tell us the difference.

A The difference as I conceive it, counselor, is that something that is untrue is nonfactual whereas a lie is knowing the facts and you announce to the contrary; in other words, you knowingly propagate untruths for purposes of deception.

Q If someone, then, propagates an utter untruth, that means it doesn't have a grain of truth in it, wouldn't they be propagating for deception?

A They may be doing it through ignorance.

Q Do people lie through ignorance or mistake?

A I don't think--

THE COURT: He has made a definition for you. He has answered your question.

Q Would you say that this is an ad hominem attack against an individual:

"The most recent outburst in the sorry repertoire of wild and fearful publicity is deliberately calculated to sow distrust and misgiving among urban consumers against the chemical industry."

Would you say that was an ad hominem attack on an individual if it is directed to an individual?

MR. ROTHWELL: Your Honor, I object to the question being forked; if he can identify the individual --

MR. AGOGLIA: Miss Carson, sir.

MR. ROTHWELL: I object, then.

THE COURT: Sustained.

Q Would you say that this statement against an individual, particularly Miss Carson, Doctor, would be a personal attack or n ad hominem attack?

MR. ROTHWELL: Your Honor, may I object and ask counsel to be--

THE COURT: Sustained.

MR. ROTHWELL: -- instructed to refrain from bringing this matter out in this manner?

Q Doctor, were you called upon--

THE COURT: When I sustain an objection, that strikes out the question and the answer. It is not before you for any purpose whatsoever.

MR. AGOGLIA: May I proceed, sir?

THE COURT: Yes.

Q Were you asked by the Montrose Chemical Corporation in May of 1970 to submit a statement on your position concerning the DDT controversy?

MR. ROTHWELL: Objection, your Honor.

THE COURT: Sustained.

MR. ROTHWELL: Collateral.

Q Doctor, would you agree that during the course of the controversey, the heated controversy concerning DDT, that the National Audubon Society was unalterably opposed to DDT use; would you agree with that?

MR.ROTHWELL: I am objecting.

THE COURT: Sustained.

MR. AGOGLIA: I am only trying to establish this as a foundation, if your Honor please.

THE COURT: I don't care. I want the trial in this case to be limited to the libel here, not to the issue of DDT.

Now, I have made that clear yesterday morning and I made that clear at the bench before.

Next question.

The issue here is not the controversy over DDT; the issue here is whether they used the bird count to show that the population of birds increased and that it was a lie as the Audubon article said.

MR. AGOGLIA: Judge, I would except to your Honor's statement very respectfully.

Q I would ask you this, Mr. Devlin, and I will proceed according to the judge's guidelines.

THE COURT: His name is White-Stevens, not Devlin.

Q Forgive me, Mr. White-Stevens. I'm sorry.

You did tell us about your conversation with Mr. Devlin of The New York Times, did you not, sir?

A Yes.

Q You told us the first conversation would be rather lengthy. Would that be accurate?

A At least three-quarters of an hour.

Q There was some joking going on during the conversation?

A Well, it was very amicable, yes.

Q Joking? Is it yes to joking?

A We had a laugh or two, if that's what you mean.

Q Did he ask you about writing an article for The Times at that time?

A Yes, he suggested that I might write an article both for the Op Ed page and for the magazine section.

Q Did you follow up on that?

A I later heard from another member of The New York Times --

MR. ABRAMS: I will object on the ground that it is information which came to the witness' attention after the alleged libel in question and it is irrelevant.

THE COURT: Sustained.

Q During the course of this conversation with Mr. Devlin, did you ever instruct him not to print the names?

A Of course not. I have no authority to suggest to a reporter of The New York Times what they should or should not publish. I merely suggested that he should look into the matter carefully before he did so.

Q Did you discuss with Mr. Devlin of The Times the propitiousness of publicizing this material with the names attached?

A Yes. I mentioned that he should look at whether or not it was propitious for a prestigious paper to publish a libel.

Q Did you have any further conversation with him along those lines?

A You mean in subsequent phone calls?

Q Use of the names.

A I don't follow you. We discussed for 45 minutes the overall picture and the names kept coming in and out of it throughout. I do recall distinctly mentioning to him there were such things as libel laws as well as freedom of speech.

Q Did you, sir, tell him in words or substance that he ought to get the facts from all sources before he published any article?

A Yes, indeed, I did. In fact, I gave him the sources from which he could get such facts.

Q Was that the purpose of your letter of August 8?

A Yes. The purpose was to put it in writing so he would have it before him and that I would have a record of what I had told him.

Q Did you suggest to Mr. Devlin that Mr. Arbib would be entitled to his opinion, but whether it should be printed for the public was another question?

A Yes. I am sure I mentioned that.

Q You certainly did suggest to him in words or substance that it would be unwise to publish the article with the names attached, did you not?

A I don't know if I used the term "unwise." I recall I used the word that it was possibly unpropitious or it was not propitious. I don't presume to tell New York Times reporters what is wise or unwise.

Q Sir, when you testified on direct examination that the public was led to believe there was a decrease in the birds, were you referring to the Audubon Society as misleading the public in that regard?

A No. I was referring more to the statement that appeared in Rachel Carson's "Silent Spring" which the Audubon Society earnestly supported.

Q Since they supported that, would you then agree with me, sir, that the statement you made,that the public was being led to believe that there was a decrease in birds was an argument of the Audubon Society and had been prior to --

A Yes. I think the public was led to believe that, counsel.

Q And the Audubon Society was one of the participants who were leading the public that way, would you say that is an accurate statement?

A I would say this is something the public gathered.

THE COURT: That is not the question.

Was the Audubon Society responsible for that in any way?

THE WITNESS: I think they made statements that would imply that, yes.

MR. AGOGLIA: May I just approach the bench for a moment in view of these answers?

THE COURT: Yes.

(At the side bar)

THE COURT: Yes.

MR. AGOGLIA: Your Honor, very respectfully I address myself to the Court at this time and ask your Honor to reconsider your ruling in view of the fact that the witness has now said that we adopted in substance the Rachel Carson thesis and therefore that we were on the side of the issue which --

THE COURT: I will only allow any questions going to bird counting and its effect. That's all. It is simple and that's what the cases say if you read the cases.

MR. AGOGLIA: I think one of the jurors is addressing you.

(In open court)

JUROR No. 6: May I approach the bench or may I speak up from here?

THE COURT: No. Come into the robing room.

(In the robing room)

(Present: The Court, Juror No. 6 and the reporter)

THE COURT: Yes?

JUROR No. 6: It is just a point and I am not familiar. I have never been on a case this long and the amount of evidence, and I want to know whether or not, am I allowed to take notes?

THE COURT: No. Listen carefully and if at the time of your deliberations you want some testimony read to you to clarify it, we will then reread the testimony.

JUROR No. 6: Because there are certain technical points that are brought up that I would like to refer to, but again--

THE COURT: If you, in the course of your deliberations you feel that it is necessary to refer to those, the testimony will be reread to you.

JUROR No. 6: Thank you, your Honor.

THE COURT: Have the lawyers come in.

(Counsel present)

THE COURT: The reason I excluded you originally but I put it on the record was I didn't know what was coming out of the juror's mouth.

The court reporter will now read back to you what occurred in the robing room in the 30 seconds he was in here.

(Record read)

THE COURT: All right. Normally, my procedure is if I find a juror taking notes, I stop him and tell him not to take notes.

MR. ABRAMS: I would like to raise a point, your Honor, because we are out of the presence of the jury.

THE COURT: Surely.

MR. ABRAMS: Your Honor made certain evidentiary rulings this morning which affect what would have been the scope of my cross-examination.

At an appropriate time, perhaps now, if your Honor thinks best, I would like to indicate on the record and out of the presence of the jury what the exhibits are that I would have introduced.

May I go out and come right back?

THE COURT: Surely.

MR. ABRAMS: I refer to five exhibits.

The first is New York Times Exhibit NNN for identification, an article of Dr. White-Stevens entitled "Fads and Fallacies in the Name of Ecology."

In it Dr. White-Stevens refers to unnamed people as "The New Witch Doctors," and says in part that many people involved in the pesticide debate "are actually well-educated and trained scientists and therefore must know better; but the current situation provides an ideal opportunity to gather fame and fortune not to be ignored for the sake of mere morality and ethics."

There are other similar quotations in Times Exhibit for identification NNN.

Second, I would have sought to introduce Times Exhibit for identification OOO, which is a speech given by Dr. White-Stevens entitled "Fads and Fallacies in the Name of the Environment."

The language in Exhibit OOO is similar to that in NNN and includes phrases such as "New Witch Doctors"; "Shamans";"well educated and trained scientists who therefore must know better, but for whom the current situation provides an ideal opportunity to gather fame and fortune not to be ignored for the sake of mere morality and ethics."

I would have sought to introduce Times Exhibit NN, an article written by Dr. White-Stevens entitled "The Role of Agricultural Chemicals in Feeding an Exploding Population," in which Dr. White-Stevens, among other things, refers to"criticism essentially destructive in tenor and intent, is based on half truths, scraps of irrelevant and unrelated evidence, much of it taken out of context and out of time, and largely founded upon superstition and outright falsehood."

I would have sought to introduce Times Exhibit MMM for identification, which is entitled "The Agricultural and the Food Additive Dilemma" written by Dr. White-Stevens.

The language is similar to that in the Times Exhibit NN for identification and in part says, "This criticism, unfortunately, is based on half truth, scraps of irrelevant and unrelated evidence,and to a large extent on superstition and outright falsehood."

I would have sought to introduce Times Exhibit PP, a speech by Dr. White-Stevens, entitled "The Role of Pesticides in Food Production and Health," which says in part, "...there still appears spurious tracts and articles obviously more attentive to circulation than veracity, which deliberately continue to seek to foment fear and consternation among the public over the exaggerated dangers of pesticides."

Dr. White-Stevens concludes this paragraph by saying,"This type of pseudo-scientific mixed metaphor can only be contradicted by experimental objective evidence of which there is, unfortunately, an abundance."

THE COURT: Will you tell me the reason you are going to offer this or wanted to offer it?

MR. ABRAMS: I think, your Honor, that it is relevant, first of all, for the jury to understand, even in light of your ruling, that the words in question in this lawsuit are libelous per se, the manner in which people in this area speak about these issues and speak to each other and about each other.

Without that, I think the jury is left at sea to speculate as to what liar might mean in some other context. I think the jury is competent to decide what liar means. I don't think we need an expert to tell them. But I think by putting in other evidence such as this, we can indicate that the word "liar" is simply not as serious a word as Dr. White-Stevens would have us think.

I think it also goes, as I urged upon your Honor earlier, to the question of damages in a context in which very strong things are said by the competing sides on pesticide debate.

I think the fact that Dr. White-Stevens was not simply attacked, as it were, out of the blue, but has been an extremely active participant in a vigorous and unhibited debate is relevant to what, if any, damages he could possibly be awarded.

THE COURT: Damages go to injury of his reputation, not to character and not to the fact that he may have libeled somebody else. Damages go to the impact on his reputation in the community. That's all.

MR. ABRAMS: My view is that if the jury understands -- and let me say that I could make this point even more strongly with Dr. Edwards, who is going to testify next, but I take it your Honor's rulings would be the same so I want to make the point now-- if the jury understands that the way these people, these plaintiffs and the scientific community in which they live speak about this issue is by extremely-- is by the use of extremely vituperative language, that the word "liar" is in fact no worse when used about one of these plaintiffs than the kind of language that they, at least Dr. Edwards, for example, rather routinely uses, that it musthave a bearing on whether there is any harm at all.

MR. AGOGLIA: Your Honor, may I be heard for a moment as well?

THE COURT: Yes.

MR. AGOGLIA: On the issue of damages in a libel case, the character of the individual is much in evidence and much before the jury.

THE COURT: His reputation is, not his character.

MR. AGOGLIA: Your Honor, the character of the individual goes to the making of the reputation or the absence thereof. For example, I could show any prior criminal ---

THE COURT: I could be a liar and the community would think I am the greatest guy in the world, and if you hurt me, it is what the community thinks of me, not the fact that I am a liar.

MR. AGOGLIA: Can I not show any criminal or or immoral act in the life of any plaintiff in a libel case since it goes to the question of character and reputation, and if your Honor please--

THE COURT: Not if the community never heard of it. I couldhave been convicted in the State of Washington of stealing a car and I moved to New York and I live here for 20 years, my reputation is of the higest. The fact that I was convicted in the State of Washington 20 years ago has no impact on the issue.

MR. AGOGLIA: May I also suggest that proper indication is also an element in consideration of damages in a libel and slander case?

THE COURT: I never heard of it. If you have any such, give me the citations.

MR. TROWBRIDGE: Yes, I will.

THE COURT: Give it to me at lunchtime.

MR. AGOGLIA: He has it here.

THE COURT: We are going to go ahead with this trial. I told you and my clerk has called you on the phone and on your representation of a five-day trial, I have writted a prisoner out of jail to come down here for a trial on Thursday. I have other people brought in here on Thursday. I have a case starting Friday for five days and I have a four-day case after that, and I go right to the end of the month. I can't wait. This should have been given to me long in advance.

Now if you want to give me something, I will read it over the recess, the luncheon recess. Let's go out and make a record here.

MR. AGOGLIA: Do I understand, your Honor, may I join in the offer of proof--

THE COURT: Obviously. The same ruling.

MR. AGOGLIA: Thank you.

(In open court)

Q Dr. White-Stevens, you told us that you gave a list of other scientists to Mr.Devlin incorporated in the letter which you wrote on the 8th of August, is that not so?

A Right.

Q You gave that list, did you not, to confirm what you say were the true bird count statistics between 1940 and 1960?

A Yes. I would say the impact of pesticides on the environment of which birds are a part, of course.

Q Did that take up much of your conversation with Mr. Devlin? That is, the bird count and a decrease thereof and the Audubon statistics vis-a-vis your opinion on the subject?

A Yes. I would say at least 30 or 40 or maybe 50% of our 45-minute conversation dealt with this topic.

Q You find no fault with the following statement, do you, sir, in this context, without names:

"Any time you hear a scientist say the opposite you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."

You find no fault as such with that statement absent any names attached; would you agree with that?

A No, I would not.

THE COURT: I don't know what you mean, "finding any fault with it."

A I don't think it is true.

Q Aside from the fact that you don't agree with it, sir, the statement as such -

THE COURT: He goes beyond that. He says it is not true.

Q Sir, are there people --

MR. ROTHWELL: I want to object to this line. It goes to the ultimate issue.

THE COURT: I don't understand what you are driving at. That's my problem.

Q The original foreword, I guess you understand Mr. Arbib's foreword contained no names, do you understand that?

A Right.

Q Now I am taking a sentence out of it as follows, and I am going to read it to you again, and ask you if you find that to be in any way - - I am not talking about the accuracy because I know your position on the subject --

THE COURT: I think you have to read the sentence in front of it, too.

MR. AGOGLIA: I would be happy to do that, your Honor.

Q "With increased local coverage by the press of Christmas Bird Count activities, it is important that count spokesmen reiterate the simple and truthful fact that what we are seeing is the result of not more birds, but more birders. Any time you hear a scientist say the opposite, you are in the presence of someone who is being paid to lie or is parroting something he knows little about."

A Both sentences are untrue.

Untrue?

A Untrue.

Q You would not call them lies, though, would you? You are saying they are inaccurate; is that what you are saying?

A No. I think that they are lies because I think that the people who wrote them know that they are untrue.

Q Didn't you tell us earlier, sir, that if it doesn't involve an individual --

THE COURT: No, he didn't. He didn't say that.

A Counselor, I said that my concept --

THE COURT: Wait, wait.

THE WITNESS: I beg your pardon.

Q Sir, the statement "... or is parroting something that is untrue," do you find that phrase alone offensive?

A Yes.

Q In other words, you agree that if someone is parroting something they don't anything about they should not be parroting, would you agree with that?

A I would agree with that.

Q There are people in the controversy, do you not agree, on your side of the issue who were parroting things they knew absolutely nothing about?

A Absolutely.

Q You agree with that?

A Yes.

Q Were there some people making money on the issue, paid scientists?

A If there are, I don't know any.

Q Did you ever say that there were such people?

A Not that I can recall.

Q Sir, I am going to direct your attention to what we call Exhibit NNN for identification,and I am going to ask you, sir, in view of your last answer, to read to yourself what I will point out to you, if his Honor will permit me to approach the witness.

MR. ROTHWELL: I object to this line, your Honor. I believe that exhibit is within the scope of the Court's ruling.

THE COURT: Not in respect to the question that was put to him.

Q If I may, sir, to save some time, right here.

A Yes, I agree with that statement.

Q Did you ever say that there were fame and fortune hunters on the side of the Audubon Society on the issue of DDT vis-a-vis the increase in bird count?

MR. ROTHWELL: Excuse me.

THE COURT: That is not the opposite of your question.

I sustain the objection.

MR. AGOGLIA: May I have the last question and answer read back?

THE COURT: Read it back.

(Record read)

THE COURT: What you just read does not contradict that statement.

MR. AGOGLIA: Would your Honor read it, please?

THE COURT: You just read it and I have ruled on it.

MR. AGOGLIA: I didn't read it.

THE COURT: You just read something to the witness and I said it wasn't contradictory of the statement.

Next question.

MR. AGOGLIA: I ask -- OK.

Q Doctor, did you ever suggest, sir, that the people who were opposed to the DDT ban were witch doctors?

A I don't believe I used that term with respect to the people who opposed the DDT ban.

THE COURT: This comes within my ruling.

MR. AGOGLIA: I thought in view of the question I would go --

THE COURT: I said this comes within my ruling.

MR. AGOGLIA: May I say that's all I have.

Thank you.

THE COURT: All right, Mr. Abrams.

CROSS-EXAMINATION

BY MR. ABRAMS:

Q Good afternoon, Dr. White-Stevens.

When you spoke to Mr. Devlin on the 4th of August did he read to you portions of the American Bird article?

A Yes, I testified to that.

Q And he read it to you in the exact words that it appears?

A I of course had not read the article myself and when I did read it, as closely as I can recollect, they were the exact words, yes. I don't think he read the whole article, but I think he was quoting-- I have every reason to believe he was quoting it directly from the article.

Q What did Mr. Devlin tell you that Mr. Arbib had told him?

A He told me that the scientists that were unnamed in the article to which Mr. Arbib was referring were myself, Nobel Laureate Norman Borlaug, Professor Jukes, Professor Edwards and Dr. Donald Spencer.

Q After the conversation with Mr. Devlin, you testified, I believe, that you wrote the letter which has now been admitted into evidence as Plaintiff's Exhibit 15, which is your letter to him; is that correct?

A Could you give me the date of that letter?

Q August 8, 1972.

A Yes, indeed.

Q You said in your direct examination that that letter was a recapitulation of your conversation with Mr. Devlin, is that right?

MR. ROTHWELL: Objection, your Honor. He did not say that in his direct examination.

THE COURT: He is asking,"Is it right?" He can say "No, it is not."

Q Did you not say that the letter was a recapitulation?

A Not a total recapitulation. Only a partial, obviously.

Q My first question to you is whether you said it an hour or so ago that the letter was a recapitulation of your conversation with Mr. Devlin?

A I essentially said that, I believe, yes, in part.

Q I'm sorry, sir?

A The letter is a recapitulation in part. Our conversation was 45 minutes and that letter is a page and a half or two pages, at the most, so obviously I couldn't have recapitulated the whole thing.

Q Did you recapitulate the main points?

A I felt the essential points, yes.

Q Did you say anything in the letter about any reference to you in any article in The New York Times saying that you were one of the five people named by Mr. Arbib was libelous?

A Nothing had appeared about me at the time I wrote that letter in The New York Times.

Q Did you say in the letter that you wrote that if The Times were to print the fact that you had been named as one of the people adverted to in the Audubon Society publication that it would be libelous?

A No, I did not say that.

Q Did you say in the letter that although we have freedom of speech, we also have libel laws in America?

A I don't believe I said that in the letter.

Q You said earlier this morning, I believe, that after the publication in The Times of its article of the 14th of August that you were astonished and a little disappointed.

My question to you is were you dismissed from any position that you were holding at that time?

A No, I was not.

Q What was your salary at that time?

A I think it was $28,000 a year.

Q Has it diminished since then?

A No.

Q Did you lose any friends as a result of the article in The New York Times?

A If I lost friends, I cannot say whether it was due to the article in The New York Times.

Q You don't know of any friends that you lost, is that right?

A Nobody came to me,counselor, and said, "I am no longer going to be your friend because The New York Times calls you a liar"; if that's what you mean.

Q What I mean is, do you know in fact, as you sit here today, whether you have lost any friends as a result of the publication by The Times of its August 14th article?

A No, I do not know that as a fact.

Q Do you know if anyone on The Times bears any ill will to you personally, Dr. White-Stevens?

A No. I don't know anybody on The Times other than the people with whom I have had correspondence.

Q Has The Times ever published any Letter to the Editor that you have written with respect to the pesticide controversy?

A They published one about four or five years ago dealing with the gypsy moth situation.

MR. ABRAMS: I would like to move the introduction of Times Exhibit GGG which I will show to the witness, which is a letter from Dr. White-Stevens published in The Times of October 14, 1969.

A Yes, this is the letter to which I refer.

THE COURT: Any objection?

MR. ROTHWELL: No objection.

xx (Defendant New York Times Exhibit GGG received in evidence)

THE COURT: What is the date of that?

A Yes, I recognize this letter. This is evidently another one I wrote relative to DDT and malaria.

THE COURT: Wait. May we have the date?

MR. ABRAMS: October 14, 1969.

THE WITNESS: I beg your pardon, September 14, 1969.

THE COURT: Thank you.

A This dealt with the WHO -- the World Health Organization of the United Nations program in reducing worldwide malaria through the use of DDT.

Q Could you refer, while you have the exhibit in front of you, to the last paragraph and could you read it to the jury, please?

A The last paragraph states: "Professor Jukes' point is aptly taken. To deny these innocent people the protection afforded by DDT is indeed equivalent to genocide."

Q What is genocide?

A Killing people unjustifiably or allowing them to die when they could be saved.

Q Lots of people?

A Millions.

Q Was it in your view, Dr. White-Stevens, in 1969, that people who advocated a ban on the export of DDT were advocating genocide?

A Yes.

MR. ABRAMS: I have no further questions.

THE COURT: Any redirect?

MR. ROTHWELL: Yes, your Honor. In reference only to the point that was made by my colleague about the loss of earnings, et cetera.

REDIRECT EXAMINATION

BY MR. ROTHWELL:

Q Did you receive any phone calls from family members or anything of the sort following the publication?

A I received several.

Q Will you tell us about them?

A I think the first one was a call from my eldest son who is a chemical engineer and was at that time working with Atlantic Richfield Oil Company, or ARCO in Houston, Texas, and apparently this libel had been published in the Houston Chronicle.

MR. AGOGLIA: I object, your Honor, to any publication or republication in any way binding on my client, the Audubon Society. I ask the judge to instruct the jury accordingly.

THE COURT: Overruled.

MR. ABRAMS: I would object on the grounds similar to the effect that any publication in any entity other than The New Times is irrelevant.

THE COURT: Maybe I misunderstood. Where did he read this?

THE WITNESS: He read it in the Houston Chronicle under The New York Times by-line.

THE COURT: I sustain the objection.

Q Continue with the conversation.

A He called me up and said, "Dad, what's this I hear about you being a liar in the payoff industry?"

Well, of course by that time I had read the article myself, so I knew immediately what he was referring to.

I said, "Where did you hear this?"

He said, "It's all over the plant."

MR. AGOGLIA: I object to this as being the rankest sort of hearsay,statements by his son outside of any defendant's presence.

I object to it.

THE COURT: Mr. Abrams' question has opened the door.

MR. AGOGLIA: My client is different than Mr. Abrams'. I am objecting on behalf of Audubon Society and its officers, sir, as being totally of the rankest sort of hearsay.

THE COURT: Overruled. Reputation by its very nature is hearsay.

THE WITNESS: Do I proceed, your Honor?

THE COURT: Yes.

Q Please.

A I have another son who has a doctorate in biochemistry and was at that time doing research in biochemistry at the University of Wisconsin at Madison, and he called me apparently also having read it in the local papers, and he wanted to know.

I was quite upset, and he was, too, over that particular case because he and I have the same initials, so people were asking him what was his involvement in this, you see, but of course his name is not Robert, it is

Roderick H. White-Stevens, so it was easy for him to duck out of that, but I was very upset that this had spread around the country after some 40 years of what I thought was an impeccable career with respect to honesty and scientific objectivity to find people calling me up and saying, "Hey, what's this I hear about you being a liar in the payoff industry?"

I was very incensed over it and disturbed and still am.

Q Were there any other such incidents, Dr. White-Stevens?

A Well, the dean at Rutgers University called me into his office and wanted to know what was going on.

There had been a number of other people who had spoken to me. I didn't keep a record of it.

I frankly sort of put up my coat collar on the matter and sort of hoped the wind would blow by without too much altercation, but over the years it has persisted. I have had students in my classes come to me and say, "Hey, I hear this, that, and the other."

THE COURT: We are not worried about this, that and the other.

MR. ABRAMS: I am willing to open the door a little bit, but not that much.

THE COURT: I know, you didn't open it that far.

Q Continue, Dr. White-Stevens.

A Well, that's about it. I received a number of calls --

Q Excuse me, sir.

You were interrupted by an objection and it is not proper to say thus, such and so. You can either say what the students told you or else not.

A Very well. The students have asked me whether I was the same White-Stevens that was listed in The New York Times as being a liar in thepayoff industry, and, of course, having worked for industry over a period of some 25 years, it becomes very awkward and difficult and embarrassing to protest that question. "Yes, I did work for industry." "Yes, I was paid the salary by industry for the work I did for them." "But I did not go around the countryside lying on their behalf and being paid for doing so."

But, of course, the explanation of these things never quite catch up with the original tort.

MR. ROTHWELL: No further questions.

Thank you.

THE COURT: You may step down.

Next witness.

MR. ABRAMS: I have one more questions, if I may, your Honor.

THE COURT: Yes.

RECROSS-EXAMINATION

BY MR. ABRAMS:

Q Dr. White-Stevens, you referred earlier to some of the societies,The National Academy of Science and so forth.

A Right.

Q Have you been dismissed by any of them?

A No.

Q Have charges been brought against you?

A No, I had no charges brought against me.

MR. ABRAMS: Thank you.

THE COURT: You may step down.

(Witness excused)

MR. ROTHWELL: I call Dr. J. Gordon Edwards.

J. GORDON EDWARDS, called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROTHWELL:

Q Would you state your occupation?

A I am a teacher, a college professor at San Jose State University.

Q What is your subject?

A Entomology.

Q What is that?

A The study of insects.

Q Would you please state, starting around, approximately around the period you started your graduate work, and give us a very brief recap of your educational experience and qualifications, Doctor?

A Yes, all right.

I grew up in Indiana, did my undergraduate work at Butler University in Indianapolis in zoology and botany.

After the war I went to Ohio State University where I got my Master's degree in entomology and also earned my Ph.D. there in entomology.

Q What was your thesis subject?

A My thesis was on the Beetles East of the Great Plains.

Q I can't quite hear you.

THE COURT: It is a little difficult in here. The acoustics are very poor.

A Beetles East of the Great Plains.

Q Do you have any credentials in the field of conservation, Dr. Edwards?

A Well, I have always been interested in conservation and in the environment going back into the 1930s as a member of the Nature Study Club of Indiana.

Q A member of what?

A Nature Study Club of Indiana.

Q That was in the thirties?

A That was in the thirties.

Then, of course, a member of the Sierra Club, the Audubon Society. Similar interests throughout the years.

Q Did you engage in any activities relating to environmental matters?

A I have participated in the effort to protect the environment from various things.

Q Can you tell us a little about those?

A With reference to the point here, I have been interested in bird counts, the Audubon bird counts, and in Christmas bird counts. I was a bird-bander, putting bands on the legs of birds, to follow wherever they go and that was for the U. S. Biological Survey, again in the 1930s, perhaps into the 1940s.

I have worked as a ranger naturalist in the National Parks Service for ten years, ten summers.

Q Where was that?

A Mostly in Glacier National Park, Montana.

Also one year at Mt. Rainier National Park in Washington, in the same position, ranger naturalist, leading hikes and giving lectures on nature subjects, and I have worked as a biological collaborator for the National Park Service for the last 15 years, summers only, in Glacier National Park, and some work on ecological research in Wyoming for the New York Zoological Society. This was on high altitude insects and their ecology.

Things of that sort.

Q You mentioned you belonged to the Sierra Club and the National Audubon Society.

Do you have any other memberships?

A Well, I am a member of several entomological organizations: The Pacific Coast Entomological Society, which is our biggest one on the West Coast. I have been president and vice president of that organization.

The American Association for the Advancement of Sciences and the Kansas Entomological Society, and the Oregon Entomological Society, and so forth, and Systematic Zoology Society. I have been an officer in that.

I am a member of the Explorers Club, the American Alpine Club. Most outdoor-type organizations.

Q Where did you spend the summer of 1972?

A In Glacier National Park.

Q What were you doing there?

A I was working on the high altitude insects and the ecology of the park.

Q Could you just describe, not in any extended way, but was this working in an office or just what did it involve?

A Back-packing into the back country collecting insects, observing the insects, and the birds and the rest of the environment. Mostly field work during the summer. I do my lab work in the winter, based on the specimens I have collected during the summer, so I am in the field most of the summer.

Q Do you spend nights outdoors?

A Yes, I do.

Q Up in Glacier National Park?

A 30 or 40 nights a summer in a tent or sleeping out in Montana.

Q You do a little mountain climbing, too?

A Yes. I wrote a climber's guide to Glacier National Park for the Sierra Club, which was published in 1960, with revisions later.

Q Do you have any qualifications as an ornithologist?

A That was my first interest in science, in ornithology, before I became a botany-zoology major, and I have followed it through the years publishing articles.

My first article was published in the Indiana Waltonian on Bird Photography. Later I published in Audubon Magazine.

Q What are the years? Do you have any idea of the time span of this?

A In Audubon?

Q Well, starting in the Indiana publication.

A That was I believe 1936.

Q What have you published in this area since that time?

A Well, the article in Audubon was on the alpine grouse in Glacier National Park which was reprinted by Audubon in the Year's Best or the Best Animal Stories of Audubon, I guess it is called as a book, and in the Audubon Encyclopedia.

Then I published in Minnesota Naturalist, which is a good conservation publication, the general theme again being protection of the environment, and I wrote a chapter in a book on birds for Dr. Pettingill, a book entitled The Bird Watchers-America, and, of course, I had given lectures on birds many times.

Q Before what groups?

A In the National Park and also for our local Sierra Club chapters and Audubon groups in Santa Clara County.

Q Did you say Audubon groups?

A Yes, sir.

Q Turning to August of 1972, of course you are a plaintiff in this litigation, and the litigation centers around, of course, the publication on August 14, 1972, of an article by The New York Times.

Where were you? Where were you on August 14, 1972?

A I was in Glacier National Park, Montana.

Q More specifically, that's a pretty big place, as I understand it?

A At the Mannie Glacier area. This is on the northeast side of the park.

Q I am not familiar with that, but just give us a little more detail, please.

A My first awareness of the article was when some of the rangers ran across the article or it was sent to them and they came to show it to me and asked me about it.

Q You mean rangers in your party?

A No, the rangers who worked for the Park Service throughout the park.

Q I see.

A Naturally, I work closely with the rangers there.

Q You were at that time employed by the Interior Department?

A Yes, sir.

Q And they are employed by the Interior Department?

A Yes.

Q What was the content of these communications that occurred and before you say that, could you tell us, as best you can, when; in other words, the article was published as we know on August 14; when did the first news of it come to your attention?

A I really can't recall. It was fairly recent. I don't know if I should estimate, but some time within a week after the publication, I am quite sure.

Q Can you tell us the event? In other words, had you been out in the field and come back or what?

A Yes, sir. As I recall, the first awareness was in the hotel lobby that evening when we normally get together with the group of rangers and visitors in the hotel in the evening to discuss things and plan new activities.

This is the first recollection I have of hearing about the article.

Q Who was there at that meeting or at that gathering?

A I can only remember two or three rangers, my wife and daughter, and other people, visitors to the park.

Q Was this the hotel at which your wife and daughter were staying?

A We all stayed in campgrounds.

Q In the campgrounds?

A We come into the hotel at nights, especially rainy nights.

Q What was said during the course of that to the extent you can remember it?

A Yes. Well, they pointed up the statements and asked me if I was getting paid by the pesticide industry.

Of course, I assured them I was not, and again I repeated some of the statements that I had made so many times before concerning bird numbers. We are all interested in the bird counts, the eagles, especially, up there, so I attempted to reassure my friends and visitors that I had not been paid to give any information about bird numbers and certainly had not been paid by the pesticide industry to lie.

Q Just so that I may understand a little bit better, Dr. Edwards, this ornithology business, would you tell us what that is, what that includes?

A To be in ornithology includes recognizing the birds when you see them or hear them and also learning more about their behavior, nesting habits, food -- as an entomologist and an ornithologist, it makes a nice combination because the birds eat the insects, the insects are feeding the birds, and the two studies go very nice together.

Q Is there anything moe to ornithology other than bird observation and identification?

A Oh, yes. I think the study of the physiology of the bird is very important, how they respond to the environment and environmental factors, obviously.

Q Have you had these courses and done these studies?

A I have taken courses in ornithology and I have taught field ornithology at Ohio State while I was a graduate student working for Dr. Donald Borror, and, of course, in the National Park Service, we have frequent bird walks, pointing up the birds and discussing their behavior, their importance to the environment and so forth.

Q Tracking on now and picking up where we left off, you had discussed this meeting, your little gathering at the hotel and your wife and daughter were present, and this first came to your attention.

Then when next did it come to your attention?

A Well, I got letters from friends and colleagues at San Jose State sending me copies of -- I don't remember when I first got my copy of the actual article, whether it was in Montana or through the mail from San Jose.

I also got the copy of the original article in American Birds, which I am sure was mailed to me in Montana. I lose track of the actual sequence of time, but I did hear about it in letters from San Jose from students, former students, and faculty members on campus.

Q This was after your return to your campus?

A This was while I was still in Montana.

Q What was the nature of these communications, if you can summarize them for us, Dr. Edwards?

MR. ABRAMS: Your Honor, I will object to the question and the entire line of questioning.

I think it is entirely improper.

THE COURT: Sustained.

Q What time did you leave the Glacier National Park in terms of date?

A Early September.

Q That was for the purpose of going back to school?

A Back to teach.

Q Did you encounter any, let's say, reverberations of this when you arrived back on campus?

A Yes, I did. All during the fall returning students mentioned it and my present class of students discussed it.

MR. ABRAMS: Your Honor, I will object again.

THE COURT: Unless there is specificity as to whether he lost any specific emolument, but just general testimony can't come in.

MR. ABRAMS: I would request the judge to advise the jury that the testikony thus far adduced --

THE COURT: I have stricken it.

MR. ABRAMS: Thank you.

Q What is your professional view in reference to the prevalence of bird life in North America?

MR. AGOGLIA: I object to the form of that question.

THE COURT: I think you better reframe the question. It doesn't seem to mean much.

Q Do you have a view or opinion as to the changes in bird populations in recent years in the United States?

MR. AGOGLIA: I will object only to the recent years. I think you mean before 1972, do you?

MR. ROTHWELL: Let's find out from the witness.

THE COURT: No, let's tie it down to the area we are talking about.

MR. ROTHWELL: All right.

A From 1942 to 1970, 1972; yes, I spent a lot of time in the field observing birds and I read a great deal of information, literature on the subject, including the Christmas Bird Counts, and the Hawk Mountain counts, and the other studies that you have heard about.

My impression was that birds, if anything, were more abundant than they had been before the second World War.

Q Was that your opinion in 1972?

A That was my opinion in 1972.

Q Therefore, do you feel that that is a false or erroneous opinion or was it a lie, any of those characteristics?

A Certainly a false impression as far as I was concerned.

Q What is a false impression?

A It doesn't --

Q We are both trying to talk. We have a hearing problem and I am sorry, it is my fault.

MR. ABRAMS: I would really ask counsel to reframe the question. I don't know what false impression he is talking about.

THE COURT: I suggest you stand back by the lectern and raise your voice and reframe your question.

Q Dr. Edwards, can you hear me plainly from here?

A Yes.

Q You stated you did have an opinion, I think you stated you had an opinion about the changes in bird population in this country in the years preceding 1972, and then you put a time frame around that.

What was that?

A Well, from the time I began to get into the field after the second World War, I was impressed by the fact that there seemed to be more birds in the areas where I was studying them than there had been before the second World War, and as the years went by, I became more aware of the controversy, I suppose, and I looked more carefully at the birds and wondered is there really a decrease or an increase in bird life.

This is where I came to the strong conclusion that there had not been a decrease in the bird life that would be correlated with the use of our new insecticides.

Q I think you have stated your views. I just want to put one more element of foundation under it.

Did you base this on any more than your personal observations? Did you study into the matter?

A Yes, sir. I studied it very extensively because I was concerned. As an entomologist we have insects that are causing problems and we have to control the insects, and, therefore, I wondered what effect this is having on the rest of the environment.

For this reason I was especially concerned about my birds. So I was aware of the possible relationship and was reading all that I could on the subject.

Q Over what period of time?

A Well, my teaching at Ohio State in 1945 had further spurred this interest, so I am sure from that date onward and during the 1944-1945 period, from then on the present time I have tried to keep up on the ornithological literature.

MR. ROTHWELL: No further questions, your Honor.

THE COURT: Mr. Agoglia.

CROSS-EXAMINATION

BY MR. AGOGLIA:

Q Doctor, would you agree that the Audubon Society was an active force in the anti-DDT program as it existed between 1960 and 1972?

A Yes, sir.

Q Would you consider it one of the main forces opposed to the use of DDT?

A Yes, I would.

Q Have you written extensively,sir, on the Audubon's involvement in this controversy?

MR. ROTHWELL: Your Honor, I want to interpose an objection.

THE COURT: If you are going to go into the same thing you are going to get the same ruling, so I suggest you go on to something else.

MR. AGOGLIA: This deals directly with Audubon, sir.

THE COURT: It doesn't make any difference. You know the scope of my ruling. Stay within it, please.

Go ahead.

Q Have you charged our society, sir, that is, the Audubon Society, in 1969, with deliberately publishing lies about DDT and its effect upon the bird population in this country?

MR. ROTHWELL: Your Honor, I think --

THE WITNESS: Could you repeat that, please?

THE COURT: Sustained.

MR. AGOGLIA: Your Honor, I will have to make an offer of proof outside the presence of the jury.

THE COURT: Come on over.

(At the side bar)

MR. AGOGLIA: Your Honor, may I suggest that we do it in your chambers in view of the time involved here.

(In the robing room)

THE COURT: Well?

MR. AGOGLIA: I would like to make an offer of proof based upon a letter written by J. Gordon Edwards, dated 17 February 1970, addressed to Mr. Lester Line, of the Audubon Magazine, 1130 Fifth Avenue, New York, New York.

I am directing my attention to the following in that letter:

"I really thought you were an unwilling pawn of the directors of the society from the tone of your non-committal letter to me in response to my own plea for journalistic responsibility on the part of the Audubon Magazine."

Going down--

THE COURT: All right, I sustain an objection to that statement.

Next one.

MR. AGOGLIA: "I still find it incredible that the Audubon Society leaders persist in their heavily-financed de facto murder plot against the human race and

I shall continue to speak out against their genocidal campaig to ban all exports of DDT."

THE COURT: I sustain an objection.

MR. AGOGLIA: "From a moral viewpoint your publication will be exposed as corrupt and the more deaths you cause, the stronger will be your castigation. You speak of a victory of David over Goliath, but I assure you there are many more appropriate biblical interpretations for your activities."

THE COURT: The same ruling.

I gather you are objecting to all of this?

MR. ROTHWELL: Yes. We have to, your Honor, of course. We will be here --

MR. AGOGLIA: May I respectfully point out that this deals with the DDT controversy and bird counts and that's the genesis of all these letters.

I specifically make reference to the fact that they were claiming some kind of -- they use the words "heavily-financed"-- which charges us, your Honor, with corrupt practices which would go to the very issue of this case.

I thought this was well within the guidelines of your ruling. I think you said yesterday, your Honor, that if it was a direct confrontation between --

THE COURT: You have read to me portions you wish to read to the jury,the plaintiffs objected, and I have ruled.

MR. AGOGLIA: OK, sir.

Letter 5 December 1969,from Mr. Edwards to the Audubon Society, the same caption as previously, that is Lester Line, Editor.

"The reason for sending you the copy of each letter mailed to the Society offices was I was not sure of the relationship between the Society and the Magazine and I did want to be sure that you were completely aware of the genocide campaign and aware that the Society deliberately publishes about DDT causing cancer, killing birds, causing thin-shelled eggs and persisting in the environment for years."

MR. ROTHWELL: Objection.

THE COURT: Same ruling.

MR. AGOGLIA: I want to make sure I am not duplicating this.

20 December 1969, a letter from the witness to the National Audubon Society. That is the sole caption. 1130 Fifth Avenue, New York, New York.

It reads as follows:

"I have just been given another copy of the leaflet entitled "DDT-The Wrong Insecticide," which bears your address and solicits my support in this campaign.

"Unfortunately nearly every statement on this leaflet is demonstrably wrong and the dissemination of such erroneous information is criminally irresponsible. It grieves me to see the Audubon Society playing an active role in the degradation of human life and welfare for the organization had previously seemed sincere, well informed and reliable."

MR. ROTHWELL: Objection.

THE COURT: The same ruling.

MR.AGOGLIA: I wanted to read from an article written by the witness entitled "Bird Reproduction and Abundance," that part of it: "The anti-DDT thesis is being publicized for the political and financial advantage of certain organizations and individuals," referring, if your Honor please, I respectfully suggest, to one of these being the leader of the anti-DDT movement, that is, the Audubon Society.

MR. ROTHWELL: Objection.

THE COURT: Sustained.

MR. AGOGLIA: I am reading from a paper by Dr. J. Gordon Edwards, entitled "The Environmental Kangaroo Court."

I would like to offer the following:

"I suppose the campaign to outlaw DDT in the United States" -- I'm sorry -- "I oppose the campaign to outlaw DDT in the United States because:

"1. Such actions are unnecessary.

"2. A ban on DDT use would be genocidal.

"3. It is irresponsible to ban DDT in defiance of the testimony of most medical, agricultural, entomological and public health experts, and

"4. The propaganda directed against DDT is lacking in objectivity, credibility and scientific ethics and truthfulness.

"I shall discuss these points in detail."

MR. ROTHWELL: Objection.

THE COURT: The same ruling.

MR. AGOGLIA: The same letter under the caption 2: "A ban on DDT would be deliberately genocidal. The campaign to ban DDT in the United States doesn't bother me personally nearly as much as the further exhortation to ban exports of DDT. Such a move would result in at least five million human deaths annually and perhaps close to fifty million deaths if we also include those who starve as a result..."

MR. ROTHWELL: Objection.

THE COURT: Same ruling.

MR. AGOGLIA: Under caption 4:

"The campaign against DDT lacks objectivity, credibility and truthfulness. Most scientists grew up, as I did, with truthful, trustworthy friends and colleagues. It is quite a shock, therefore, to discover that some of our modern scientists have deliberately obscured facts, distorted and misused data, misquoted sources, padded references with statements only co-conspirators, and entitle their articles in such a way as to conceal the actual significance of their observations."

MR. ROTHWELL: Objection.

THE COURT: Same ruling.

Does that complete it?

MR. AGOGLIA: No, sir.

I would like to read from an article by the witness entitled "The Infamous Ruckelshaus DDT Decision." "26 June 1974, for immediate release."

I want to read those portions as follows:

"For seven months EPA/EDF witnesses who testified in the Washington hearings admitted to experimental bungling, ineptitude, shameless obfuscations, and the deliberate publication of errors and distortions in their scientific articles."

MR. ROTHWELL: Objection.

THE COURT: Same ruling.

MR. AGOGLIA: "Patient cross-examination of dozens of those witnesses and authorities," incidentally one of whom will be called here, "gradually revealed the enormity of the lucrative, anti-DDT conspiracy it is.

"Some biologists employed in federal wildlife research on birds, for example, disclaimed knowledge of the results of annual Audubon Society bird counts, disclaimed knowledge of the results of the Hawk Mountain Sanctuary count."

MR. ROTHWELL: Objection.

THE COURT: The same ruling.

MR. AGOGLIA: Under the caption numbered 10 of the same article:

"Mr. Ruckelshaus evidently means that if the witnesses failed to tell the truth and are proven to have perjured themselves, it will have no effect on his decision against DDT. As a matter of fact, that is exactly what did happen during the hearings and the administrator seems to feel it necessary to explain why lack of credibility of his witnesses has not affected his decision."

MR. ROTHWELL: Objection.

THE COURT: Same ruling.

MR. AGOGLIA: That is all, your Honor.

Just let me make sure, your Honor, of one thing further and then I will be done.

That is all. Thank you.

THE COURT: Yes, Mr. Abrams?

MR. ABRAMS: I think it might save time if I would make my proffer at this time.

I would seek to introduce New York Times Exhibit RRR for identification, a letter of November 20, 1969 of Dr. Edwards to the Audubon Society and refer to, among others, the following statements:

"I am grieved and sickened... I can only hope that you have been guided by poor advice and lack of personal knowledge rather than deliberately proposing all these serious lies to the public..."

Continuing with the same article --

THE COURT: Let's do it separately.

MR. ROTHWELL: Objection.

THE COURT: The same ruling.

MR. ABRAMS: Continuing from the same article, "Responsible elements within the organization must then either openly disassociate themselves from the Society or, if they remain silent, bear a burden of guilt far surpassing that borne by Hitler's countrymen during the years of Nazi brutality and extermination."

MR. ROTHWELL: Objection.

THE COURT: The same ruling.

MR. ABRAMS: From the same document:

"Which of the propagandist's lies have influenced you to substitute birds and oysters for human lives and human welfare?"

MR. ROTHWELL: Objection.

THE COURT: The same ruling.

MR. ABRAMS: From the same document, the phrase "big lie" propaganda.

MR. ROGHWELL: Objection.

THE COURT: The same ruling.

MR. ABRAMS: I would seek to introduce Times Exhibit SSS for identification, a letter of November 23, 1969, to the Editor of Audubon Magazine, which refers inter alia to "The erroneous claims and frightening lies which have beer perpetrated by the Audubon Society."

MR. ROTHWELL: Objection.

THE COURT: The same ruling.

MR. ABRAMS: From the same document, the phrase "Never before have we seen persons masquerading as 'biologists' or 'ecologists'widely believed and applauded for statements that are absolutely untrue."

MR. ROTHWELL: Objection.

THE COURT: The same ruling.

MR. ABRAMS: The New York Times Exhibit UUU for identification, a letter to the Editor of the Audubon Society Magazine, dated December 5, 1969, which states in part: "I did want to be sure that you were completely aware of the genocide campaign and aware that the Society deliberately publishes lies about DDT causing cancer, killing birds, causing thin-shelled eggs and persisting in the environment for years."

MR. ROTHWELL: Objection.

THE COURT: The same ruling.

MR. ABRAMS: From the same document: "I might add that I personally feel very sorry for you and your staff for I am sure no editor can find it easy to cover up the truth and I am sure that as a good editor, as you obviously are, you cannot be unaware of the truth concerning the present Audubon genocide campaign."

MR. ROTHWELL: Objection.

THE COURT: The same ruling.

MR. ABRAMS: Times Exhibit WWW is a letter dated February 17, 1970, previously referred to I believe by Mr. Agoglia, which uses the phrase "I still find it incredible that the Audubon Society leaders persist in their heavily-financed de facto murder plot against the human race and I shall continue to speak out against their genocidal campaign to ban all exports of DDT."

MR. ROTHWELL: Objection.

THE COURT: Same ruling.

MR. ABRAMS: I seek to introduce New York Times Exhibit XX, the Sun-Oregonian of December 28, 1969, in which Dr. Edwards in a signed article said:

"Recently, however, we have been exposed to a barrage of anti-DDT propaganda which is remarkably untruthful."

MR. ROTHWELL: Objection.

THE COURT: Same ruling.

MR. ABRAMS: New York Times Exhibit III for identification from a publication entitled "Water-1972," an article written by Dr. Edwards in which he said, "Most scientists grew up,as I did, with truthful, trustworthy friends and colleagues. It is quite a shock, therefore, to discover that some of our modern scientists have deliberately obscured facts, distorted and misstated data, misquoted sources, padded references with statements only by co-conspirators, and entitled their articles in such a way as to conceal the actual significance of their observations."

MR. ROTHWELL: Objection.

THE COURT: The same ruling.

MR. ABRAMS: Later in the same paragraph, the phrase "we can cite dozens of examples of flagrant perfidy in articles which are being utilized in an attempt to eliminate DDT and other chemicals."

MR. ROTHWELL: Objection.

THE COURT: The same ruling.

MR. ABRAMS: Times Exhibit PPP, an article by Dr. Edwards entitled "Facts and Fallacies concerning DDT," which says, "The propaganda directed against DDT has been lacking in objectivity, credibility, truthfulness and scientific validity."

MR. ROTHWELL: Objection.

THE COURT: Same ruling.

MR. ABRAMS: Times Exhibit GG, an open letter from Dr. Edwards entitled "Bird Reproduction and Abundance," in which Dr. Edwards said, "We realize that the public and the science student must have confidence that they are being told the truth by scientists in high positions. When the truth is distorted, obscured or deliberately debased, all science suffers. The public loses respect for science and for all scientists and we will all pay heavily for that loss of respect. We feel very strongly, therefore, that every effort must be made to force our colleagues to tell the truth, the whole truth, and nothing but the truth. This has certainly not been done in the case of DDT and its role in environmental affairs.

"We urge scientists, students, and news media to join us in the attempt to prevent a continuance of the sort of misleading, fright-mongering pseudoscience that has become prevalent in the last three years."

MR. ROTHWELL: Objection.

THE COURT: Same ruling.

MR. AGOGLIA: Your Honor, I would like the record to indicate that I read from Audubon Exhibit E for identification. I would just like to read one further thing from Audubon Exhibit H for identification which is the hearing before the Committee on Agriculture, House of Representatives, Federal Pesticide Control Act of 1971.

I wanted to read as follows, by Dr. Edwards:

"The blatant untruthful statement has been repeated by anti-DDT forces all across the country adding to the other untruthful and misleading propaganda that has characterized the fight to ban DDT."

MR. ROTHWELL: Objection.

THE COURT: Same ruling.

MR. ABRAMS: I understand, your Honor, that it still may be possible if the witness should testify in particular ways, to impeach the witness' credibility by such testimony?

THE COURT: Yes.

Are you now through with your cross-examination of this witness?

MR. AGOGLIA: Yes, your Honor.

THE COURT: All right.

MR.AGOGLIA: Could I think that over for a second more?

No, I think I won't say negative to that. I think I will try to attack his credibility on cross-examination and try to get it in that way as your Honor suggested I might be able to.

THE COURT: I don't know. I haven't seen any credibility yet that's been raised, but go ahead.

If you start to use it as a back door, I am going to stop you.

(In open court)

THE COURT: I think it is a good idea to go to lunch. See you at two o'clock.

(Luncheon recess)

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AFTERNOON SESSION

2:00 p.m.

(In open court; jury present)

THE COURT: I want to see counsel up at the bench, please.

(At the side bar)

THE COURT: I just wanted to put on the record that I have checked your cases that you gave me and while they make such general statements, they clearly are not applicable to the facts of this case as shown by the text writers on the subject of New York law of libel and slander. There is no immediacy involved.

(In open court)

J. GORDON EDWARDS, resumed.

CROSS-EXAMINATION CONTINUED

BY MR. AGOGLIA:

Q Dr. Gordon Edwards, at your examination before trial, page 11, line 15, sir, I am going to ask you were you asked the following question and did you make the answer.

Okay, sir?

A Yes, sir.

Q "Q Now, sir, in your lectures and speeches about the subject matter of bird counts and the effect of DDT on bird life of the United States, have you ever had occasion to call any of your opponents liars?

"A No, I haven't."

A I think that is apparently my statement, yes.

Q Is it accurate, sir?

A I think so.

Q The same question with regard to bird life, the decimation or decrease in the number of birds and the effect of DDT on them, have you ever written calling anyone liars?

MR. ROTHWELL: Objection, your Honor. This gets into that forbidden area.

MR. AGOGLIA: Just within the framework that you have given me, sir.

THE COURT: That's right. Go ahead.

A I may have. I don't think so, but I may have.

Q Would you be kind enough to take a look at what we call, Doctor, if I may, Audubon Exhibit G for identification, and without reading it, since it's not in evidence, sir, would you be kind enough to read it to yourself and then I will ask you a question after you have had a chance to read it.

A I have read that.

Q Would you look at this?

MR. ROTHWELL: Your Honor, did he ask the witness to take a look at it without reading it? I don't see how that could be done.

MR. AGOGLIA: Reading it to himself, forgive me.

THE COURT: He is reading it to himself.

MR. ROTHWELL: Thank you.

Q I ask you --

A May I see the first one again?

Q Yes, sir. I believe that's it.

I ask you again, sir, have you ever in your writings stated that the defendant Audubon was lying or telling a big lie when they took the position in the controversy that DDT was causing the death of birds or the reduction in the number of birds?

MR. ROTHWELL: Your Honor, objection.

THE COURT: Overruled.

A May I have the original question instead of this last question? The two questions were different.

THE COURT: The first question he put to you was reading from your deposition in which you stated under oath that you never called anybody a liar.

THE WITNESS: I agreed with the first question.

THE COURT: You said that was the testimony you had given.

Now he showed you a document and he now asks you isn't it a fact that you did call the Audubon Society liars?

Q In writing, sir?

A I agree with the first question which does not agree with your second question. This is my trouble.

Q Let me go back again and maybe I could clarify it so there would be no confusion.

Did you ever -- just yes or no, please -- in writing ever call the Audubon Society and its officers liars for the position they took in the DDT controversy vis-a-vis the number of birds?

A I would say not.

Q You did not.

And having looked at the documents I have shown you, they don't refresh your recollection one way or the other?

A I don't see that here, no, sir.

MR. AGOGLIA: Your Honor, on the question of credibility, I am going to ask for permission to read this.

THE COURT: No. He says it doesn't. That's the end of it.

Q Forgetting whether or not it refreshes your recollection, did you in fact call the officere of the Audubon Society liars, contrary to what you just said?

A The officers of the Audubon Society?

Q Yes.

A I don't understand.

Q Did you call the Audubon Society or its officers liars?

A That's not in there, no, sir.

Q I said did you, sir, whether it's in there or not in there. Did you, yes or no?

A I can't recall doing that, no, sir.

Q On December 5, 19- --

THE COURT: No, don't read it.

MR. AGOGLIA: I am not going to read it.

Q On December 5, 19- --

THE COURT: Having seen you in action now for two days, I jump in fast. Now go ahead.

MR. AGOGLIA: That really is --

THE COURT: The record will reflect what I said.

MR. AGOGLIA: I know, sir, but --

THE COURT: Next question.

Q Did you on 5 December, 1969, sir, send a letter to the Audubon Society under your signature?

A I did.

MR. AGOGLIA: I offer that letter in evidence, if your Honor please, previously marked Audubon Exhibit G for identification.

MR. ROTHWELL: Objection.

THE COURT: Sustained.

MR. AGOGLIA: Your Honor, I would like to addres- the Court at the side bar for the moment.

THE COURT: It's repetitious. The answer is no.

MR. AGOGLIA: It's not the same. It's entirely different.

THE COURT: Okay.

(At the side bar)

MR. AGOGLIA: I would like the record to reflect that your Honor's remark to me is uncalled for, and more important than that it's totally prejudicial to the rights --

THE COURT: I will have the court reporter read to me the two instances where you deliberately misrepresented to witnesses the facts of the situation, and the second instance I am talking about to just my remark. If you want it I will read it to the jury.

MR. AGOGLIA: May I finish my statement on the record?

THE COURT: I thought you were.

MR. AGOGLIA: No, sir.

Your Honor, I very respectfully move for the withdrawal of a juror based upon the remark you made this morning which I think will prevent the Audubon Society of the United States from getting any sort of a fair trial from this jury.

I know your Honor meant nothing personal or any such thing as that, but I respectfully submit that in view of the fact that some of the jurors snickered after you made your last remark, that this Society has a right to be treated in this court fairly, regardless of what you think personally of me.

THE COURT: The Society is being treated fairly. My comment was on your conduct which I have a perfect right to do.

Motion denied.

Now, what did you want to say?

MR. TROWBRIDGE: Your Honor, you accused Mr. Agoglia, my co-counsel for the Audubon Society of misleading the Court yesterday in connection with the letter sent by Dr. White-Stevens to Mr. Devlin prior to the publication of the August 14th article.

THE COURT: That's not what I am talking about.

MR. TROWBRIDGE: I want to add to our motion to the effect that you accused us of misleading you on purpose, and the evidence came out today that that precise language was exactly in response to Mr. Devlin's telephone call. There was no misleading.

THE COURT: It wasn't in response to a bird count.

MR. TROWBRIDGE: We never suggested it was.

THE COURT: Yes, it was. That was the basis of the question that was put yesterday, and that isn't one of the two I am talking about.

(In open court)

MR. AGOGLIA: I have nothing further.

Thank you, sir.

THE COURT: Mr. Abrams.

CROSS-EXAMINATION

BY MR. ABRAMS:

Q Dr. Edwards, where were you teaching at the time the Times article was published on August 14, 1972?

A I was on the payroll of the San Jose State University in California. I was on vacation during the summer.

Q Where are you teaching now?

A The same place.

Q Has your salary gone down?

A No, sir.

Q Have you been dismissed from any of the honorary organizations that you referred to earlier?

A No, sir.

Q Have any charges been brought against you by any of those organizations?

A No, sir.

MR. ABRAMS: I have no further questions.

MR. ROTHWELL: No redirect, your Honor.

THE COURT: Were you ever on the payroll of any of these chemical companies?

THE WITNESS: Never. No, sir.

THE COURT: Was the sole source of your income for five years before August 14, 1972 as a teacher?

THE WITNESS: Except for consultation work on termites in houses.

THE COURT: Termites in houses?

THE WITNESS: Locally.

THE COURT: What does that mean? I could bring you in and you can tell me what's wrong with my house?

THE WITNESS: People would try to sell a house with termites in it or without termites in it --

THE COURT: It had nothing to do with bird counts?

THE WITNESS: It had nothing to do with bird counts, with insects. Testifying as to the life cycle of insects that might infest houses. It had nothing to do with chemicals or birds.

THE COURT: Thank you.

Next witness.

(Witness excused)

MR. ROTHWELL: I call Dr. Jukes.

THOMAS HUGHES JUKES, one of the plaintiffs, called as a witness on his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROTHWELL:

Q Dr. Jukes, what is your occupation?

A I am a professor at the University of California at Berkeley.

Q What is your subject, sir?

A My title is in medical physics. Professor of medical physics.

Q How long have you been in that position?

A Since 1963.

Q 1953?

A 1963.

Q '63, thank you.

Can you tell us, sir, something of your qualifications and background, starting about the time you finished your undergraduate work in college.

A Yes.

I finished my undergraduate work in college in 1930 at the University of Toronto, and I was awarded the degree of bachelor of science in agriculture. I specialized in chemistry in my undergraduate work.

Then I took graduate studies at the University of Toronto Medical School, majoring in biochemistry with minors in physiology and anatomy, and I earned my PhD in 1933.

Following this I was awarded a post-doctoral fellowship in medical sciences at the University of California at Berkeley, which I held from 1933 until 1934.

In 1934, I was appointed to the faculty of the University of California at Davis, which is their college of agriculture, and my function there was to teach poultry nutrition and carry out research in nutrition. I stayed there in that capacity until 1942, when I accepted a position with Lederly Laboratories, a pharmaceutical company in Pearl River, New York.

Lederly Laboratories is a division of the

American Cyanamid Company.

At Lederly Laboratories my function was to direct research and to continue my research on vitamins, on their isolation, identification and usefulness, and also in cancer research, on trying to identify and find and put to use chemicals that could be used in cancer chemotherapy. My research there was also concerned with antibiotics.

THE COURT: How long were you there, from when to when?

THE WITNESS: From 1942 until 1963, although there was a change in location around 1960 or so when the laboratory that I was involved in was moved to Princeton, New Jersey, and this was the agriculture center of the American Cyanamid Company and was more directly concerned with agricultural research.

THE COURT: Since 1963?

THE WITNESS: Since 1963 I have been a professor at the University of California carrying out research under public health grants and under a grant from the National Aeronautics & Space Administration.

My laboratory at Berkeley is in the Space Sciences Laboratory, and I have also offices and teaching responsibilities in the division of medical physics, and I am a lecturer in nutritional sciences at the University of California.

Q In the department of medical physics, and in connection with the federal grant, you are working on what, aeronautics and space; is that it?

A Well, my grants are related to the origin of life and to what's called exobiology, meaning the possibility of life elsewhere than on the planet Earth; also with regard to the evolution of protein molecules and molecular evolution in general; also with respect to DNA, RNA and protein structure.

Q Just tell us very briefly what that DNA and RNA is. I don't want anyone to get it confused with other initials.

A It's just the chemistry of heredity and how it takes place.

Q Dr. Jukes, how about publications, have you published?

A Yes, I have published in the scientific literature starting in 1930. My first publication was on the effect of diet on composition and formation of birds' eggs, specifically hens' eggs, and from then on I have published articles in many scientific journals on biochemical subjects, on nutritional subjects and on the subject of evolution.

I am also on the editorial boards of various journals and my function is to edit and comment on other people's manuscripts.

Q They ask you to comment on other people's --

A Manuscripts.

Q -- manuscripts. Thank you.

Do you have any idea at this point as to how extensive these publications are, in terms of numbers of them?

A Oh, about 250 to 300 publications in the scientific literature.

Q What about memberships in professional organizations, other groups relating to your interest and activity in the scientific world?

A I have been a member of the Society of Biological Chemists, which is the leading professional society in my field, since 1935.

I have been a member of the American Institute of Nutrition since 1938, and I was elected a fellow of the American Institute of Nutrition three or four years ago.

I am also a member and -- an honorary member as well as a regular member of the American Society for Animal Science, and am a member of the Society for experimental biology in medicine.

I was a member of the American Chemical Society, but I let that membership lapse because I felt I was carrying too many memberships.

I am a member of the International Society for the Study of the Origin of Life, and I could go on, but that's enough.

Q Thank you very much. That's good.

How about your interest and activities in matters relating to conservation?

A I have long been interested in conservation. I have been a life member of the Sierra Club since 1939 and I have been quite active in the Sierra Club.

When I moved East from California and when the war ended I started activities to organize Sierra Club activities in the eastern states, and I organized the first chapter of the Sierra Club outside the State of California and became -- I was appointed the first chairman of that by the board of directors of the Sierra Club and I was later elected to its first chairmanship.

It started with 50 members and it reached 17,000 eventually.

Q Do you have any other activities or interests in terms of conservation that you could tell us about?

A Yes. I was elected president of Trustees for Conservation, which is an organization affiliated with the Sierra Club, in 1970, and served for a year.

I am a member of other outdoor organizations, including the American Alpine Club and the Explorers Club.

Q You are a member of the Explorers Club, you said?

A Yes.

Q Are there any inventions or developments to your credit?

A Well, more in the line of discovery.

I discovered two vitamins that were needed by birds, specifically by poultry, and I believe I am regarded as an international authority on poultry nutrition.

I developed a new concept in the nutrition of birds, using chickens, showing that they could live and reproduce on a diet consisting solely of purified foodstuffs, sort of a chemically purified diet.

Q Turning to the subject matter in question here, Dr. Jukes, I think the testimony is here that you received a phone call from John Devlin of the New York Times in reference to that person working on an article.

At that point would you tell us what happened, please?

A Yes. On August the 7th, 1962 --

Q What day was that?

A That was a Monday.

Q A Monday.

A It was in the middle of the morning. I was in the outside office and my secretary answered the phone in my office, and she said, "The news room of the New York Times calling you."

So I answered the phone and Mr. John Devlin introduced himself over the phone and said that he was working on an article, which later appeared, as we know, in the New York Times. He said that he had been informed by the National Audubon Society that certain individuals, five individuals that he named over the phone, were paid liars on behalf of the chemical industry, and he named me as one of those, and he said that I had represented that the number of birds in the Audubon bird counts had increased and what had actually happened, he said, according to the Audubon Society, was that the number of observers had increased.

I said, "Well, I have always divided the number of birds by the number of observers to give the number of birds per observer on any statements I have made on those bird counts," and I said I would immediately supply him with information on this.

So I wrote him a letter on the same day and mailed it immediately, enclosing information for him on that topic.

He also asked about the question of fish-eating birds which are thought by some to be unusually vulnerable to dietary contaminents, including certain pesticides, and I said that I have a letter written by the president of the Hawk Mountain Association, to which I belong, bearing on that point, and I included that in my mailing to Mr. Devlin, and I believe that mailing is part of the record, is it not?

Q Yes.

A In any case, the statement to which I drew his attention was by the president of the Hawk Mountain Association saying that the osprey count --

MR. AGOGLIA: May I object to this now? He is referring to a statement that I don't think is in evidence.

MR. ROTHWELL: Very well.

We will straighten this out, your Honor, if I may have a moment.

Q When speaking of that letter which you sent to Mr. Devlin with the enclosures, is that it or a copy thereof?

A Yes. I recognize these pages from the Hawk

Mountain counts giving the osprey counts.

I drew his attention on the phone to the fact that i this compilation the --

Q Just a moment.

You are talking now about the conversation with Mr. Devlin?

A With Mr. Devlin.

Q We would like you to exhaust your recollection on that.

A I drew his attention in our conversation to the fact that the Hawk Mountain Association, that the osprey had reached a long-time high because the weak ones had been killed off by DDT and the healthy ones were stronger than ever. I thought that was rather illogical.

Then I also drew his attention to the fact that he had -- he was contemplating making statements that we were liars, and I said this was not so.

He then said that he had got our names from Mr. Arbib, who was quoting a manuscript by Mr. Clement listing these five names, so as soon as I had written to Mr. Devlin, on the same day I wrote to Dr. Stahr, the president of the National Audubon Society, also on August the 7th, 1972, requesting a copy of this manuscript so that I could see for myself what Mr. Clement had said.

THE WITNESS: Shall I continue?

THE COURT: It's up to your attorney.

Q Yes.

A I received a reply from the National Audubon --

MR. AGOGLIA: I object. This is not conversation now.

THE COURT: The question is what was your conversation with Mr. Devlin.

THE WITNESS: All right.

A That, I believe, concluded my conversation with Mr. Devlin. My next conversation with Mr. Devlin was on August the 14th.

Q We will get to that in a moment, Dr. Jukes.

I show you Plaintiffs' Exhibits Nos. 8 and 9, which are, respectively, a letter over the typed name Thomas H. Jukes, dated August 7th, and a letter over the typed name of Ruth Torscianiec, dated August 10th, on the letterhead of National Audubon Society; Plaintiffs' Exhibits 8 and 9.

Can you identify them, Dr. Jukes?

A Yes, I can identify them.

Q Tell us what they are.

A This first letter was by me, August the 7th, to

Dr. Sylvester Stahr along the lines I have just mentioned.

Q Who is Dr. Sylvester Stahr?

A Dr. Sylvester Stahr is president of the National Audubon Society.

Q And the other one?

A The other one is to me from Ruth Torscianiec, secretary to Dr. Stahr, and she said he was aware and she would --

THE COURT: Don't tell us the content.

MR. ROTHWELL: I offer these into evidence.

THE COURT: Any objection?

MR. AGOGLIA: Yes, I object, as having no relevance on the issue in this case at all.

MR. ABRAMS: No, your Honor.

THE COURT: My question was addressed to Mr. Abrams. I will come to you after I ask Mr. Abrams.

MR. AGOGLIA: Forgive me, your Honor, I thought you were looking at me.

MR. ABRAMS: No.

THE COURT: Now you.

MR. AGOGLIA: Yes.

THE COURT: On what grounds?

MR. AGOGLIA: They are irrelevant to the issues in this case.

THE COURT: Let me see it.

Objection sustained.

Q You have told us what was in that conversation with John Devlin, to the best of your recollection --

A On --

Q The first conversation, I think you testified, was on August 7, 1972.

A Yes.

Q I didn't hear you, but you may have said something to the effect, did you tell him that you thought the Audubon Society foreword material was true, or did you tell him it was not true?

A What material?

Q The material in that Audubon foreword.

MR. AGOGLIA: I object to this. There is no evidence that he had the foreword before him and knew what was in it.

Q Did Mr. Devlin read to you excerpts from American Birds?

A Yes.

Q Did you make any comment to him about those excerpts?

A I said those were not true, that I was not a paid liar, and also that I had never quoted bird counts without dividing the number of birds by the number of observers.

Q Did you have a second conversation with John Devlin?

A Yes.

Q When was that?

A That was on August the 14th, 1972.

Q What was the occasion of that?

MR. ABRAMS: Your Honor, I will object now.

MR. AGOGLIA: Objection.

THE COURT: First of all, maybe Mr. Devlin called him.

THE WITNESS: No, I called Mr. Devlin.

THE COURT: You called him.

Objection sustained. This is after the publication.

Q When did the publication first come to your attention, the publication of August 14, 1972?

A On the same date.

Q In what way did it come to your attention, Dr. Jukes?

A A clipping was brought to my desk by one of my colleagues.

Q Do you recall who that was?

A No.

Q Do you recall the comments that were made, or was there any conversation?

MR. ABRAMS: I will object again, your Honor.

MR. AGOGLIA: Objection.

THE COURT: Sustained.

Q What happened after that in terms of your contact with this August 14, 1972 article?

MR. ABRAMS: Objection as to form, your Honor.

MR. AGOGLIA: I object to the form of the question.

THE COURT: Reframe your question.

Q Did anything else occur wherein that article was brought to your attention after that one event you spoke of, a colleague bringing it to you in the office?

MR. AGOGLIA: I object to the form, sir.

MR. ABRAMS: I object to the form of the question.

THE COURT: I think you ought to be specific. I will let you even lead him, if you have to.

Q Dr. Jukes, all I am trying to do is to get you to tell us, the jury and the Court and counsel here, what else happened to you as a result of the publication of that article, in terms of the article, if you will.

MR. AGOGLIA: Objection.

MR. ABRAMS: I do object again, your Honor.

THE COURT: If it's specific, I will take it; if it's general, I won't. And I can't tell until he answers.

A You mean comments by other people?

Q Yes.

A On the article.

THE COURT: Comments, no.

Did you lose any grants?

THE WITNESS: My grants decreased since that date, but I have no way of knowing whether that was the direct result.

MR. AGOGLIA: May I move to strike that, sir, please?

THE COURT: I think it stands for itself, doesn't it? He said that he can't show it, and therefore it can't be proved.

You are still in the same position?

THE WITNESS: Yes.

THE COURT: Making at least the same salary?

THE WITNESS: Somewhat less.

Q I didn't hear your answer.

THE COURT: He said, "Somewhat less," but that may be the legislature's failure to appropriate enough money to the University of California.

A I think that his Honor has placed his finger on that.

MR. ROTHWELL: May I have just a moment, your Honor? I think I may have another exhibit.

THE COURT: Yes.

(Pause)

Q Showing you Plaintiffs' Exhibit marked No. 3 for identification, which is a letter on the letterhead of National Audubon Socity, dated August 14, 1972, I ask you if you can identify that.

A Yes, I can. This is a letter from -- on the letterhead of the National Audubon Society, addressed to the editor of the New York Times, and it carries at the foot of it, "Sincerely, signed for Arbib by RCC after telephone consultation; Arbib N. Dak at AOU, Robert S. Arbib, Jr."

MR. ROTHWELL: I offer Exhibit 3 in evidence, your Honor.

THE COURT: It's already in evidence. It was introduced on the testimony of Mr. Devlin on direct.

MR. ROTHWELL: I am sorry, your Honor. My error. I should have known that from the stamp on it.

Q Could you tell us how that came into your possession, Dr. Jukes?

A That copy of that letter was sent to me by the National Audubon Society by an assistant to Dr. Stahr.

Q By whom?

A An assistant to Dr. Stahr.

MR. ROTHWELL: No further questions, Dr. Jukes.

CROSS-EXAMINATION

BY MR. AGOGLIA:

Q Dr. Jukes, just a few, if I may.

Sir, would you agree that there was a rather heated controversy between 1960 and 1972 on the issue of DDT and its deleterious effect upon bird life in this country?

A Yes.

Q You were a part of that controversy; would that be a fair and accurate statement, sir?

A I was involved in some of the discussions.

Q Were there many scientists on both sides of the issue, sir? Would that be a fair and accurate statement?

A That would be an accurate statement, yes.

Q And numbers, would that even be possible to estimate, sir?

A No.

Q You had such a large group on each side, you couldn't even give numbers; would that be a fair statement?

A I would want to count them out before I commit myself on numbers.

Q I didn't mean to annoy you. I meant, were there large numbers that would take some time to get to?

A Yes.

MR. AGOGLIA: Thank you, sir.

Your Honor, could we be permitted to address ourselves to the Court in chambers as we had this morning concerning the similar material without --

THE COURT: Yes.

You may proceed.

CROSS-EXAMINATION

BY MR. ABRAMS:

Q Dr. Jukes, have you come to write letters to the New York Times that have been published by the New York Times?

A Yes.

Q I would like to show you first Times Exhibit EEE for identification, a letter of yours of August 24, 1969, and ask you if this is a copy of a letter that you wrote to the Times which was printed by it.

A The letter --

Q If I can approach you, sir.

A It's rather difficult.

Yes. This is a letter to the New York Times about malaria control and quoting the Director-General of the World Health Organization; right?

Q It's about DDT, is it not?

A Yes.

MR. ABRAMS: I move its admission, your Honor.

THE COURT: Any objection?

MR. ROTHWELL: I am going to object to the admission of this because of its contents, your Honor.

THE COURT: Let me see it.

MR. ABRAMS: If the Court please, I will be following up and your Honor may want to view them as well with certain other letters which are somewhat similar.

THE COURT: I will see counsel in the robing room.

(In the robing room)

THE COURT: What's the purpose of offering this, Mr. Abrams?

MR. ABRAMS: I wish to offer this and --

THE COURT: First let's do EEE for identification.

MR. ABRAMS: I wish to offer it as proof of lack of ill will on the part of the Times towards this plaintiff. The Times published with frequency articles and op ed articles submitted by this plaintiff. If there were any ill will by the Times, it would be actual malice, and I think I am entitled to show that there was none.

THE COURT: An article back in 1969 relative to a '72 publication? I would sustain the objection to EEE for identification.

MR. ABRAMS: May I make an offer of proof as to the next one?

THE COURT: Yes.

MR. ABRAMS: I was going to offer next Times FFF which is an answer to that letter by Mr. Stahr, the president of the National Audubon Society, which is in favor of abandoning DDT, and then as Exhibit --

THE COURT: What's the date?

MR. ABRAMS: August 31, 1969.

THE COURT: I sustain an objection to that.

MR. ABRAMS: I was going to offer next Times Exhibit HHH, a letter from Dr. Jukes of the 5th of October, 1969, responding to Dr. Stahr.

THE COURT: The same ruling.

MR. ABRAMS: I would intend to offer next as Times Exhibit ZZ an op ed piece published by the times, written by Dr. Jukes, August 3, 1971, entitled, "Like it or not, DDT is good for you."

THE COURT: I will let that one in on the issue of lack of ill will.

MR. ABRAMS: I am going to offer next a letter of August 18, 1971, from Roderick Cameron. He is an executive director of the Environmental Defense Fund responding to Dr. Jukes' article, and I would offer that as a preliminary or an introduction for Times Exhibit BBB, which is a response of Dr. Jukes of October 4, 1971.

THE COURT: I will allow it in solely on the issue of lack of malice.

MR. ABRAMS: I am going to introduce op ed pieces of October 2, 1972 --

THE COURT: When I say "lack of malice," I mean lack of malice --

MR. ABRAMS: In the ill will sense.

THE COURT: -- on the damage part of the case, not the actual malice on the liability part of the case.

MR. ABRAMS: It is an admission with respect to lack of ill will type malice, although if there were evidence of any ill will on the part of the Times, I think it would go to liability as well, your Honor.

THE COURT: I don't think so. Not under the standard the plaintiff has to meet. If he shows you knew it was untrue or reckless disregard for the truth, your lack of ill will doesn't make a bit of difference.

MR. ABRAMS: If he could show ill will, that would bear upon the two issues that your Honor raises.

THE COURT: But that isn't in this case so far that I could see.

MR. ABRAMS: I don't think it's going to be in the case.

THE COURT: Neither do I. That is why I am limiting it solely to the damage issue in the case.

MR. ABRAMS: I would seek to introduce, then, Times Exhibit CCC, an op ed piece written by Dr. Jukes, published on October 2, 1972, entitled, "Antibiotics and Meat."

THE COURT: What date?

MR. ABRAMS: October 2, 1972.

THE COURT: That is after the event.

MR. AGOGLIA: I am going to object to that.

THE COURT: I will sustain an objection to that one.

MR. ABRAMS: Similarly, Times Exhibit DDD, which is January 13, 1973, entitled, "On Trial out West," for the same purpose.

THE COURT: Objection sustained to that.

MR. ABRAMS: As long as we are in here, your Honor, could we make the proffer now?

THE COURT: Yes.

MR. AGOGLIA: May I be excused to go out and get my material?

THE COURT: Will you be through with this witness when you finish this?

MR. ABRAMS: Yes.

MR. ROTHWELL: This would be a good time for me to interject that I don't have a witness to follow this one. I didn't conceive of finishing the three. I made the mistake of telling Dr. Buchanan he could proceed out to California.

This is not going to make any difference in the presentation of plaintiffs' case.

THE COURT: You have an hour and a half to go. I can't waste an hour and a half time. It's too valuable. It makes a difference between charging the jury on Wednesday or on Thursday.

MR. ROTHWELL: Your Honor, the case will be finished before the conclusion of the trial period on Monday, from the point of view of hte plaintiffs.

THE COURT: But if you can finish now, I can start a defendant on Monday and maybe finish one up.

MR. ROTHWELL: We couldn't get -- Yannacone has to come in and the two experts, Philip Marvin has to come in and the librarian.

THE COURT: Where are they? They are supposed to be here sitting in the courtroom. It's now, on the clock, five minutes to 3:00. I told you yesterday I am sitting until 4:30 today. I announced that in open court.

You can't keep postponing this. I don't understand you lawyers. We are under tremendous pressure on cases here. We can't try them at leisure.

Now, luckily, in the month of June I was able to reach some civil cases, and I put one after the other back to back to the end of the month, and July I am trying criminal cases again. This is a '73 case. I shouldn't be trying '73 cases in '76.

I am sorry. You will have to rest. I can't give you an adjournment now. I could be starting a defendant's case now.

Go ahead.

MR. ABRAMS: Consistent with the proffers we have made previously with respect to the other two plaintiffs, I would seek to introduce the following exhibits:

Times Exhibit L, an article by Dr. Jukes entitled, "DDT, Human Health, and the Environment," which says in part that the Audubon Society "shows underlying resentment of human beings and of their works, including cities, farms, highways and especially private industry."

MR. ROTHWELL: Objection.

THE COURT: Let me see it.

Objection sustained.

MR. ABRAMS: I would seek to introduce Times Exhibit S, which is an article by Dr. Jukes, entitled "The True Facts about Pesticies and the Environment," and which says in part, "Since the issue of monetary award has been raised, let us examine the financial rewards made by those opposing pesticides. The National Audubon Society must undoubtedly have benefited financially from the current campaign against pesticide by gaining new members and donations."

MR. ROTHWELL: Objection.

THE COURT: Sustained.

MR. ABRAMS: I would also seek admission of Times Exhibit O for identification, an article by Dr. Jukes, entitled "Scientific Agriculture at the Crossroads," in which Dr. Jukes is quoted as saying, "I realized that DDT has done far more for human beings than all the research for nutrition, and also realize that we were confronted with the successful use of the 'big lie' in scienc for the first time."

MR. ROTHWELL: Objection.

THE COURT: Sustained.

MR. ABRAMS: I would also seek the admission of Exhibit O in its reference to "Silent Spring," a book by Rachel Carson, as being a "bone-chilling science-fiction story book."

MR. ROTHWELL: Objection.

THE COURT: Sustained.

MR. ABRAMS: And I would also seek the admission of Exhibit O for its reference to "quacks" and "food quackery."

MR. ROTHWELL: Objection.

THE COURT: Sustained.

MR. ABRAMS: I would seek the admission of Times Exhibit Q, a statement of Dr. Jukes at the Seattle hearings on DDT, October 15, 1969, in which Dr. Jukes accused another prominent professor at Stanford University, a Dr. Paul Ehrlich, of saying things which were "reminiscent of the ravings of T. D. Lysenko."

MR. ROTHWELL: Objection.

THE COURT: Sustained.

Mr. Agoglia has some now.

MR. AGOGLIA: Your Honor, with your permission I would offer to read in from again Exhibit L of the New York Times the following statement:

"The National Audubon Society, which appears to have a predominantly white middle-class membership, is one of the most active anti-DDT organizations. For a member to condone the use of pesticides would be tantamount to the deepest heresy in a religious sect. For an official of the Society to approve such use would be fiscal lunacy in view of the tremendous amount of free publicity that the Society has received as a result of 'Silent Spring'."

That's all I have.

MR. ROTHWELL: Objection.

THE COURT: Sustained.

Nothing else; just that one?

MR. AGOGLIA: Yes, sir. He took the thunder from me.

MR. ABRAMS: Your Honor, I have one more comment, so you know I will be saying it.

We will be objecting to the expert witnesses adverted to; I mentioned that yesterday.

THE COURT: Who are the expert witnesses and what are they going to testify to?

MR. ROTHWELL: Mr. Friedman is a librarian and he is going to testify to the circulation and currency of the New York Times, something about its readership profile and its use by scholars as a standard research tool, the presence of the data and information in the New York Times in computer banks, the fact that it's relied upon by libraries all over the country as the standard informational source that they maintain.

His testimony will take, I think, on direct and cross, your Honor, less than forty minutes.

THE COURT: That isn't Mr. Abrams' objection.

MR. ROTHWELL: It goes to the question of damages; how do you quantify damages.

THE COURT: What is your objection?

MR. ABRAMS: I think it's irrelevant.

THE COURT: The circulation?

MR. ABRAMS: No, we will concede that. That was conceded in the pretrial order. That being said, I don't think there is any reason to have an expert.

THE COURT: What about its being a standard research tool for scientists?

MR. ABRAMS: I don't think we need an expert to come and tell the jury who reads the New York Times.

THE COURT: I think so. If it's true. You may show on cross-examination that there is no basis for his statement, but if the representation is true, that it serves as part of the data bank, you use this to gain information, I think that comes in.

MR. ABRAMS: To the extent of what Mr. Rothwell is going to try to adduce, one is other publications of the Times, like the New York Times index, which is referred to in his statement of what the gentleman will say, make any reference to it. That if anything would be a separate alleged libel, and I think any reference --

THE COURT: Wait a minute. The index is merely how you find things in the Times, isn't it?

An index is an index is an index.

MR. ABRAMS: An index is an index.

THE COURT: If this is where you go to look for what article in the Times you want to read -- I gather the index is not the original source material, it just tells you where to go to find it.

MR. ABRAMS: That's right. It also has a little summary of what the article said.

MR. ROTHWELL: It has the case head notes and a lot of people rely on that.

THE COURT: That's the one thing you must learn, never rely on a case head note.

MR. ABRAMS: And also a case head note is a separate libel and if he objects to the index, that would be a separate libel which is not pleaded.

THE COURT: If he is using the Times index as itself a source material on the publication's libel I sustain your objection. If he says that the index is what they go to to find the original article which they are looking for then I overrule your objection.

MR. ABRAMS: May I address myself to the second thing, which is the report quality, economic and social status of the various categories of readership of the New York Times.

I think it would be highly prejudicial to have testimony before the jury that only a very special kind of people, perhaps unlike the jury, read the New York Times.

THE COURT: I agree with you. That's not the issue here anyhow. It is his reputation in his community that counts.

MR. ROTHWELL: Your Honor, the New York Times has an especially strong circulation in these plaintiffs' communities.

THE COURT: How is this man going to prove that?

MR. ROTHWELL: I think from the Times' own material. They got out and sell advertising space, and they give their potential customers lots of data about readership profiles, economic, social status, educational level, and so forth. The Times itself has produced a great deal of material on that subject,for other purposes, of course, and this gentleman has researched it all, and I think he would qualify as an expert.

THE COURT: I think you would qualify him to come in as a resource scientist of the type of men that claim to be libeled here, that these men's reputation in that community, the scientific community, could be hurt because this is a place that their confreres go to look for materials.

But on the general profile of the reader of the Times, I don't think so.

MR. ABRAMS: May I turn to the other expert, John Buchanan.

MR. AGOGLIA: You are not going to call him.

MR. ROTHWELL: Your Honor --

THE COURT: Wait.

You are in the middle of saying something.

MR. ABRAMS: The other expert listed by the plaintiffs is a Mr. John Buchanan. I don't know if Mr. Buchanan is still scheduled to testify or not.

Is he?

MR. ROTHWELL: Mr. Abrams, following our conference, preliminary conference, where I was advised by the Court that I couldn't call Mr. Buchanan out of order, he is on the way to California to chair a scientific conference, and he delayed his departure a day to be here Friday. I think your Honor quite properly wouldn't let me take him out of order, and I didn't dream of it by 3:00 o'clock Friday we would be in this situation, or he would be sitting right out there in the courtroom.

In view of the rulings the Court has made in this matter to date, I would think a great deal of Mr. Buchanan's testimony would now be not received, and I wouldn't ask him the questions about the methodology that scientists have and the parameters of discussions disputed and debeted among them.

MR. ABRAMS: If that's so, the only thing left from what counsel advised us that he wants him to testify to is the effect of the language used --

THE COURT: Mr. Abrams, pardon me.

I think what Mr. Rothwell is trying to say, he is not going to call Mr. Buchanan.

MR. ROTHWELL: We are trying to get Dr. Cross, who is head of a department at the University of Massachusetts to come down. He knows the reputation of my clients, and to the extent reputation is in issue I was advised, I think by Mr. Agoglia in his conversation with the Court that he intends to attack the reputation of my clients.

THE COURT: Then you put him in on reubttal. Reputation is presumed until it's been raised by the defense by attack. You can put him in rebuttal.

MR. ABRAMS: We would certainly oppose him testifying on the direct case.

THE COURT: On the direct case he couldn't come in, but if they are going to attack the reputation of your clients on their defense you may of course put in testimony to rebut their bestimony, but not on your direct case.

MR. ROTHWELL: Mr. Abrams?

MR. ABRAMS: I have nothing more to say.

MR. ROTHWELL: Aren't you going to speak to Mr. Philip Marvin?

MR. ABRAMS: I don't care about Mr. Marvin.

THE COURT: Is he outside?

MR. ROTHWELL: No. He is coming in on Sunday night to testify on Monday morning.

THE COURT: So you have got Marvin and who else?

MR. ROTHWELL: If we're not going to have Cross it's Marvin and the librarian, Friedman.

THE COURT: Marvin and the librarian. Of course you may need for rebuttal. Are you prepared to proceed and let him go Monday morning? I don't want to waste an hour and a half.

MR. ROTHWELL: And also Mr. Yannacone also is part of my case.

THE COURT: Are you ready to proceed?

MR. AGOGLIA: I don't want to proceed -- I would if Yannacone -- you will understand why, I think, when you understand the substance of his testimony. He is going to try to put in malice against us and I would only have to recall people. I just cannot do it with Yannacone -- I didn't know you were going to call him.

THE COURT: You have nobody outside?

MR. ROTHWELL: No.

THE COURT: You have nobody outside you can put on now?

MR. ROTHWELL: I have no one because I will only have to put him back on again. Mr. Clement --

THE COURT: Who else are you going to have testifying besides Mr. Clement?

MR. AGOGLIA: Mr. Clement, Mr. Arbib and two people coming up Monday, one from Washington and one --

THE COURT: What about Arbib?

MR. AGOGLIA: Your Honor, let me say this to you.

They are trying to prove actual malice. I don't know what this fellow Marvin is going to say and I don't know what Yannacone is going to say. I would like to put them on and get it done just as rushed as anyone else, and I mean that, but in a situation such as this, I think it's asking me really to do something, and I don't mean -- wait, respectfully I say this.

THE COURT: You are making a long speech. I asked a simple question. Who have you got outside to put on?

MR. AGOGLIA: I don't want to put anyone on now, with your Honor's permission, until these people rest, particularly because two men are going to testify to malice, and it would just be redundant.

THE COURT: I am asking you who have you got outside? Name them.

MR. AGOGLIA: Mr. Clement and Mr. Arbib.

THE COURT: Those are the only two you have outside?

MR. AGOGLIA: That is all, your Honor.

THE COURT: Mr. Abrams, do you have anybody you can put on?

MR. ABRAMS: I am not going to call anybody, your Honor.

THE COURT: You are going to rest on the plaintiffs' case?

MR. ABRAMS: Yes. In fact, I intend to move at the end of the plaintiffs' case.

THE COURT: I obviously know you are going to move, but I haven't told you how I am going to rule.

Now, if I rule against you, are you going to put anybody on?

MR. ABRAMS: No.

THE COURT: I am just trying to work this out. I have no desire to force anybody to the wall of throwing a case out because of time. I am upset that you don't come in here and have all your witnesses sitting here. Your obligation is to have them sitting here one day, two days, three days. I can't help that. My job is to open this court at 9:30 in the morning and go to 4:30 and you keep it going, and if you can't keep it going I am sorry for you, but I am trying to work it out.

If you have no case, how long is your case going to take?

MR. AGOGLIA: I would say a day at the most, your Honor. At the most.

THE COURT: That means just your direct, or are you including cross-examination of the witnesses?

MR. AGOGLIA: Everything, because my witnesses will be short. I would expect their cross would be longer than direct. I could almost guarantee your Honor it won't take a day.

I hate like heck to say that, but won't back it up, but --

THE COURT: Let's change the question around, as I usually do in criminal cases with the Assistant U.S. Attorneys who always believe that their estimate of time is absolutely accurate because they don't believe the defense has a right to cross-examine any of their witnesses.

Starting with that, how long is it going to take you to put your direct case on?

MR. AGOGLIA: Two hours, at the outside.

THE COURT: Okay. So even if we stop now and go over to Monday, you have how much on direct, forty minutes for one witness?

MR. ROTHWELL: For the librarian, forty minutes; for Mr. Yannacone, I can finish with him in thirty.

THE COURT: But you are going to cr9ss-examine him up and down and inside out.

MR. AGOGLIA: No. I would suggest to your Honor that -- I don't think he will be that long on direct, honestly, and I certainly wouldn't be any longer than that on cross, longer than thirty minutes on any one of those.

I could tell you the librarian I have no cross on.

THE COURT: So the librarian, Yannacone and who else?

MR. ROTHWELL: Philip Marvin on the bird count bit. He is the bird count man.

THE COURT: What is he going to say about bird count?

MR. ROTHWELL: He is going to say that these people are right, the birds, generally speaking, have been on the rise for the last two decades in terms of numbers. He is going to say that the Audubon Society themselves bear this out.

THE COURT: Therefore, they knew the truth.

All right, how long is he going to take on direct?

MR. ROTHWELL: On direct examination, your Honor, he will take less than a half-hour. We will qualify him as an expert and let him lay it down.

THE COURT: I would say, therefore, that we certainly should be well into our case, since we are going from 9:30 to 1:30 on Monday, that we could possibly get to the jury by Tuesday.

MR. AGOGLIA: Yes. I would say, your Honor, it would be fair to presume we could finish the entire testimony by the luncheon break on Tuesday.

THE COURT: Motions only take two minutes.

It looks to me that we can adjourn for the day.

MR. ABRAMS: I do want to put in those letters.

THE COURT: Sure.

Have everybody here Monday in your case.

MR. AGOGLIA: I will be ready to go.

THE COURT: And maybe we will get to the jury Tuesday.

Let's go off the record.

(Discussion off the record)

(In open court)

THE COURT: You may proceed.

CROSS-EXAMINATION CONTINUED

BY MR. ABRAMS:

Q Dr. Jukes, I show you Times Exhibit ZZ which is an op ed piece published in the Times, entitled "Like It or Not, DDT Is Good for You," and I ask you if you are the author of that.

A I was not the author of the headline, but I was the author of the text.

MR. ABRAMS: I seek its admission, your Honor.

THE COURT: I ruled on it.

May I see it, please.

MR. ABRAMS: Yes.

xxx (Defendant New York Times Exhibit ZZ received in evidence.)

THE COURT: I gather that you didn't write this headline.

THE WITNESS: No.

THE COURT: You didn't draw this.

THE WITNESS: No. That ridiculous cartoon I did not draw.

THE COURT: You may proceed.

Q Dr. Jukes, I show you now Times Exhibit AAA which is a copy of a letter published in the New York Times on August 18, 1971. At the bottom of the letter is the name Roderick A. Cameron, Executive Director, Environmental Defense Fund, and the headline above it is "DDT is not good for us," and I ask you if you read this in the Times after the publication of your op ed piece.

A I did.

MR. ABRAMS: I think your Honor has already admitted it into evidence.

THE COURT: Yes.

x (Defendant New York Times Exhibit AAA received in evidence.)

Q I show you now Times Exhibit BBB, which is a copy of the New York Times letters page, the 4th of September, 1971, a letter entitled "The need for DDT," and signed with your name.

Did you write that letter?

A I did.

MR. ABRAMS: I think your Honor has already admitted this into evidence.

x (Defendant New York Times Exhibit BBB received in evidence.)

THE COURT: I would like to tell the jury that these three exhibits have been admitted by the Court not on the issue of whether the Times is liable to these plaintiffs on their claims -- I will tell you what has to be proffered later on -- but these particular exhibits come in solely on the question of damages, if you ever reach that point, to show the lack of malice on the part of the Times, if you ever reach the point that you have to decide whether punitive damages are to be awarded.

MR. ABRAMS: Thank you.

THE COURT: Any redirect?

MR. ROTHWELL: No questions.

THE COURT: You may step down.

(Witness excused)

THE COURT: Because of circumstances beyond the control of Court or counsel we unfortunately have to let you go now for the weekend. We will see you Monday at 9:30.

As I told you, Monday's session will go from 9:30 to 1:30. We will have no afternoon session. Have a good weekend.

(The jury leaves the courtroom.)

THE COURT: Could we clarify for the record the existence of Dr. Stahr in this litigation? I gather you served him with a summons and complaint, a motion was made to dismiss which was denied, but no answer was ever filed.

Does that mean you get a default judgment, Mr. Plaintiff, against Dr. Stahr?

MR. TROWBRIDGE: Your Honor, that's news to me. We filed an answer for the other two individuals.

THE COURT: You had better go look for it, because I had one of my law clerks looking all morning. It's neither in the docket sheet nor in the file.

Did you get an answer in fact?

MR. TROWBRIDGE: I am not saying we served one. It could be it's an oversight of counsel.

I would say this, that in the motion and the decision on the motion to dismiss the complaint as to Dr.

Stahr it was stated in your opinion that unelss or if during discovery if plaintiffs were not able to find any connection between Dr. Stahr and the publication, the notes to American Birds or the letter to Mr. Clement, that plaintiffs -- I don't want to quote you wrongly -- either should or shouldn't consider dismissing. There has never been any tying up of Dr. Stahr.

THE COURT: That doesn't mean you didn't have to file an answer.

MR. TROWBRIDGE: I will have to check that.

THE COURT: Did you ever get an answer?

MR. ROTHWELL: I can't say. I have the pleading file at the hotel. I shall surely check that the first thing.

THE COURT: Let me know Monday morning.

Also, if by some chance, there was an oversight and you come to the conclusion over the weekend that you really don't have a case against Dr. Stahr, maybe we can forget the whole thing.

I haven't heard anything yet, but you may have something.

All right. Have a good weekend.

(Adjournment taken to Monday, June 7, 1976 at 9:30 a.m.)

ca/

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mmds 1

J. Gordon Edwards, et al.,

-vs- 73 Civ. 3153

The National Audubon Society, Inc.
and The New York Times, Inc.

New York, New York
June 7, 1976--9:45 a.m.

Tk1
B1
a.m.

(Trial resumed - jury present)

THE COURT: You may proceed.

MR. ROTHWELL: I call Victor John Yannacone, Jr.

VICTOR JOHN YANNACONE, JR., called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROTHWELL:

Q Mr. Yannacone, you are here in response to a subpoena?

A That is correct.

Q Would you state your address, please?

A 58 Rose Avenue, Patchogue, New York.

Q Are you familiar with environmental law and environmental litigation?

A Yes, sir.

Q Are you the same Victor John Yannacone that was known 10 years ago as the original environmental lawyer?

A Yes, sir.

Q You have participated in some of the major environmental litigation in this country?

A Yes, sir.

Q You are thoroughly familiar with the issues and problems relating thereto?

A Yes, sir.

Q Do you know Mr. Clement?

A Yes, sir.

Q Are you familiar with the parties in this case?

A Some of them.

Q Which ones?

A I know Dr. Jukes personally; I know of Dr. Stevens; I know Dr. Edwards as an acqaintance; I know Mr. Clement, or I have known Mr. Clement personally. I know Dr. Stahr as an acquaintance; I am familiar with The New York Times.

Q How about the National Audubon Society?

A I am familiar with the National Audubon Society.

Q How about Mr. Arbib?

A Mr. Arbib I have only heard of, I do not know.

Q When did you first know Mr. Clement?

A I met Mr. Clement in 966 in the preparation of a lawsuit brought by my wife against the Suffolk County

Mosquito Control Commission to prohibit the use of DDT in Suffolk County.

Q What were the circumstances of the meeting?

A The expert witnesses we had at that time, Dr.Wurster and Dr. Woodwell, felt that we should enlist the assistance of a biologist from the National Audubon Society for the purpose of establishing some basic expert testimony on the effects of DDT on birds, and we contacted the Audubon Society through one of our scientists and Roland Clement became intimately involved in the lawsuit, and the subsequent activities of that later became the Environmental Defense Fund.

Q Would you say those words slowly, Environmental Defense Fund, please?

A Yes. We became closely involved with Mr. Clement, he became closely involved with out activities during the progress of that lawsuit against the Suffolk County Mosquito Control Commission, and in the subsequent activities and the development of the Environmental Defense Fund, the creation and development of that fund.

Q When was the Environmental Defense Fund created?

A It was formally established, if I remember correctly, in October of 1967.

Q Almost 10 years ago?

A That is right.

Q Was it active informally prior to that time?

A Yes.

Q Who were the individuals who formed the organization, if you know?

A There were 10 signatories to the certificate of incorporation, and there was a resolution passed at the first meeting to maintain an open place on the Board of Directors or Board of Trustees for Roland Clement, of The National Audubon Society, who at that time could not formally be associated with the organization. And, subsequently, I believe the Board of Directors was expanded by late 1969 to, if I remember correctly, 12 or 15.

Q Was Dr.Wurster in that original group?

A Yes, the original 10 signatories were Dr. H. Lewis Batts, a professor of biology at Kalamazoo College, Robert Burnap, a conservationist from Connecticut, who had been associated with, I believe, the Open Land Institute, or one of the other land conservation groups, Arthur Cooley, a high school biology teacher at Bellport on Long Island, Dr. Robert Smolker, an associate professor of biology at State University of New York at Stonybrook, Dr. George M. Woodwell, an ecologist at Brookhaven National Laboratory, Dr. Charles F. Wurster, an assistant professor of biological science at the State University of New York at Stonybrook, and Tony S. Taromina, regional director of fish and game for the then New York State Department of Conservation, my wife, Carol Yannacone, and myself.

Q Now, these people that you have named, they were all in a sense the founders of this environmental organization?

A Yes.

Q Can we call it for shorthand purposes EDF, Environmental Defense Fund, Incorporated.

Q How was this activity funded?

A In the beginning it was funded by voluntary services and occasional donations to cover expenses, and the actual working capitol was provided out of the pockets of the participants and on credit, such as my Diners' Club account.

Q Did that continue for an extended period?

A Through April of 1969.

Q What happened then?

A In April of 1969 --

Q Mr. Yannacone, I am sorry. I'm just asking you how the organization was funded. What happened in reference to that in April of 1969?

A The organization became funded by The National

Audubon Society, through The National Audubon Society.

Q I want you to turn to the role of Mr.Clement in that organization, EDF. Will you tell us about that?

A Well, Mr. Clement was present at its formal birth, the signing - not the signing, the actual discussion of the filing of the certificate of incorporation, and he was present at its informal birth when it was announced that it ought to be created at The National Audubon Society meeting in Atlantic City in 1967. Thereafter he played an informal but active role as our trustee of the vacant seat, as it were, was in constant communication with those of us who were actively involved in the work of the Environmental Defense Fund; he furnished us with technical advice and assistance; he furnished us with special information with reference to the efforts we were going through trying to obtain funding; he held an informal but very strong right of absolute veto over litigation activities of the organization, the same kind of veto that I held as trial counsel.

B2 Q We will get to that in a moment. Just continue with your description of the role and function and powers of Mr. Clement in that organization, EDF.

A He acted as the liaison between EDF and what we came to call the Organized Conservation Community typified and exemplified by the Audubon Society, National Audubon

Society; he was a source of information in research on occasion; he acted as a direct link between my dealings, certainly, and those of most of our trustees and the management of The National Audubon Society.

(Continued on next page.)

Q Would it be fair to say that Mr. Clement acted as the liaison individual between Audubon and EDF?

A Oh, yes.

Q Turn for a moment now, if you will, sir, to your role in EDF and just describe in general terms, please, we don't want the details -- they are not pertinent to this inquiry this morning --

A I was their attorney.

Q Were you more than that?

A Yes. In the early days, I was responsible for most of the administrative management since I had the office staff and I had the office space. EDF was run, essentially, in terms of administrative management, as a kind of troika.

Q Now, just a moment. By troika, what do you mean?

A It was a three-party operation.

Q Oh, a triumvirate?

A Triumvirate.

Q All right, go ahead.

A The triumvirate consisted of Dr. Charles F. Wurster --

Q No -- okay, continue, I'm sorry.

Q -- whose official title was Chairman of the Scientist Advisory Committee, eventually, and who did much of the work involving scientific research and effort, and who communicated regularly and often with Roland Clement and relayed information from Mr. Clement to me, myself, and on various occasions other trustees -- Dennis Pulliston --

Q I think that is more detail than we need for these purposes, Mr. Yannacone, and we want to move on rapidly here.

By the triumvirate or troika, which was central to the decisions and policies of EDF, you have named three people, yourself, Mr. Clement and Dr. Wurster, is that correct?

A Yes, the third party changed regularly.

Q Is it not true that the business of this organization was run from -- actually run -- from your law office on the second floor of your building, is that correct?

A That's right.

Q Did you have meetings there often with these three people?

A Oh, yes. We met regularly. We didn't meet at the office as often as we met at people's homes.

Q And at those meetings, there were members of EDF?

A Oh, yes.

Q And there were non-members of EDF?

A Yes.

Q Did there come a time when you terminated your activities with EDF?

A Yes.

Q When was that?

A The last official act I did for the Environmental Defense Fund was the filing of the Cross Florida Barge Canal suit on or about September 15, 1969.

Q Now, going to these meetings that you say would occur, both in your law offices or on the second floor of the building, wherein your law offices are situated, or alternatively, in the homes of some people, did you ever have occasion to discuss at any of these meetings the legalities and intricacies of libel matters?

A Yes.

Q Could you very, very briefly tell us -- first of all, let me withdraw that. That is a poorly phrased question.

At such meetings, do you recall that Mr. Roland Clement ever attended such meetings, at which these matters touching upon and relating to libel were discussed?

A Yes.

Q Would you tell us very briefly and in general terms, in essence, what that discussion was as it touched upon libel?

THE COURT: Just a moment, we have an objection from counsel.

MR. AGOGLIA: I object to the question, sir.

THE COURT: Overruled.

A The discussions generally involved my explanation of the laws with respect to libel and slander and they were precipidated usually by one of the trustees asking me to bring a libel suit or a slander suit or a defamation suit against someone who had written something or said something at a public meeting which was reported, and at each of these occasions, I reviewed what I knew about the law of libel and slander and defamation, and gave them a mini-lecture suitable for laymen on the law of libel, slander and defamation.

Q Have you ever participated in any similar meetings with the same kinds of groups, that is, EDF groups, meeting either in your office or in these homes you spoke of, at which the names of one or more of the plaintiffs in this action came up?

A Yes.

Q When you say "yes," the three plaintiffs in this litigation are Dr. Jukes, Dr. Edwards and Dr.

White-Stevens.

Now, from time to time, did the name of all three of these gentlemen come up?

A No. The names -- the name of Dr. Edwards was unknown to me during that period. Dr. White-Stevens was mentioned in passing, but the primary discussions involved Dr. Jukes.

Q At these meetings, was Mr. Roland Clement ever in attendance?

A Sometimes, yes.

Q Was Dr. Wurster ever in attendance?

A Oh, yes.

Q And now, can you tell us in substance the nature of those discussions?

A They were usually precipitated by something Dr. Jukes had written. In many cases, it was a letter to the editor of a scientific journal or, on occasion, a letter to an editor of a newspaper.

Dr. Wurster and sometimes Dr. Weissboro, who was not a trustee but was actively involved with our operations as a scientist, would point out what they felt were libelous or slanderous or defamatory statements in those letters and ask whether we could in some way stop the publication of material on the grounds that it was damaging our efforts to develop what we believed was a sane pesticide policy at the time.

Q Did the subject of how do you silence Dr. Thomas Jukes ever come up at those meetings?

A Oh, yes, regularly.

MR. AGOGLIA: I object to the form of the question. I think it is leading and suggestive.

THE COURT: Overruled.

Q You may answer, Mr. Yannacone.

A Yes, regularly.

Q Was Roland Clement present at those meetings when the subject of silencing Dr. Jukes came up?

A Sometimes.

Q Was the method of silencing proposed or discussed?

A Yes.

Q Was that to destroy his scientific credibility?

Yes, it was the primary method of attack on what we considered scientists that were "enemies."

Q Was the method of destroying the scientific credibility also discussed?

A Yes. Oh, yes.

Q What was that method, Mr. Yannacone?

A Well, we evolved a practice that began as a basic trial strategy during the Suffolk County Mosquito Commission litigation in 1966, in which we would induce a scientist who had made statements in the media or in print that we felt were challangeable to testify, and the object was to establish that these statements in the media and print had been made, and to establish it in the courtroom so that they could be tested in what we at the trial bar used to call the crucible of cross-examination.

THE COURT: We still call it that.

A (Continuing) We believed that if, in fact, the information was erroneous or the statement hyperbole, the --

Q Just a moment. Would you explain what you mean by "hyperbole"?

A Overblown, unsupported by the substantial scientific credible evidence.

Q All right, continue, please.

A It would become readily apparent from the transcript, and later on, if the scientists were quoted as an expert or sought to be quoted as an expert in the public or lay media, we could then send a copy of the transcript and point out the fact that in a real test of the validity of the statements, it was tested and found wanting, and we had some feeling,and it was later proven or established, borne out by the evidence, that once you had done this, most of the newspapers would be leery of reporting statements as gospel by scientists that had been discredited in the courtroom.

Q Mr. Yannacone, other than this courtroom tactic -- you are a lawyer?

A Yes, sir.

Q You are very familiar with these courtroom situations, are you not?

A Yes, sir.

Q All right. Now, does the phrase "smear them in the press," does that mean anything to you?

A Yes.

Q And was that phrase used at these discussions as to how to silence plaintiffs?

MR. AGOGLIA: Your Honor --

THE COURT: I think the witness ought to be asked to describe what happened, what the conversations were.

Q Would you tell us what happened at these meetings and describe the conversations as they relate and touch upon the subject matters here?

A At some of the very earliest --

THE COURT: I gather we are talking about meetings at which the names of Jukes, White-Steven and Edwards were present. I am not interested in conversations involving people who are not plaintiffs.

A (Continuing) The discussions involved primarily around Dr. Jukes, and in the earliest days, during the winter of 1967, Dr. Wurster would bring in material, letters to the editor, written by Dr. Jukes, which he felt were misleading, erroneous or defamatory, and we evolved a full formal protocol for considering these, and together with Dr. Jukes, other scientists like Dr. Spencer, people that are not involved in this litigation were also --

Q Dr. White-Stevens?

A Dr. White-Stevens occasionally -- were also discussed. The procedure was this:

Dr. Wurster was to go to the State University of New York Library at Stony Brook, together with Dr. Smoker, and obtain all of the published papers of the person in question; if possible, including his Ph.D.and Master's theses.

Mr. Clement was to use the research facilities of the National Audubon Society and their clipping services and obtain copies of all the media comments, public utterances, press releases, speeches, TV scripts and the like, involving the party.

This material was to be assembled in chronological order, I was to review it, and then I was to report on whether I believed that the witness or the party had made statements which justified either litigation involving libel, slander or defamation, or a concerted effort to bring that witness into the courtroom in one of our active cases.

This was the policy with reference to anyone that had written something that one of our trustees objected to.

The party most often discussed was Dr. Jukes.

Q All right, that's been established, Mr. Yannacone.

A Unfortunately, at none of these meetings did anyone ever produce the scientific publications of Dr. Jukes or even a good scientific biography of Dr. Jukes, and the only information we ever got from the Sudubon Society on Dr. Jukes, pursuant to our request through Mr. Clement, were copies of the actual clippings or letters to the editor that were being complained about.

The general resolution of all of these discussions was, until somebody produces some evidence that I can render a reasonably intelligent opinion on, we can't do anything, and I would again reiterate, we developed a policy at those --

Q I don't want you to get back into that general area. We are almost finished, Mr. Yannacone.

Let me ask you, if you heard the phrase, "Smear them in the press."

MR. AGOGLIA: I object, if your Honor please.

THE COURT: Overruled.

A Yes.

Q Can you tell us when is the last time you heard it from anybody that is pertinent to this litigation?

A Yes.

MR. AGOGLIA: Please note my objection, if your Honor please.

THE COURT: Yes.

MR. AGOGLIA: Thank you, sir.

A The phrase was used directly in connection with me by Mr. --

MR. AGOGLIA: Now, your Honor, you see, anything that pertains -- may we have a side bar. I think it has something that de hors this lawsuit, and I object to it, if your Honor please.

THE COURT: I assume the question only goes in relation to one of the three plaintiffs here.

THE WITNESS: One of the defendants.

MR. AGOGLIA: He said it goes to him, your Honor.

THE WITNESS: To one of the defendants, your

Honor.

MR. AGOGLIA: I thought he said it was about him personally.

THE COURT: No, about one of the defendants.

MR. ROTHWELL: One of the plaintiffs, your Honor.

THE COURT: One of the defendants is what the witness said. You perhaps didn't hear it. About one of the defendants.

You can't object to that, can you?

MR. AGOGLIA: I misunderstood.

Can I have it read back?

THE COURT: Let's start fresh. reframe your question.

Q In relation to that phrase, "Smear them in the press," or "Smear in the press," or any close form thereto, could you state if that has been used by one of the defendants in this litigation?

A Yes.

MR. AGOGLIA: I object as being -- your Honor, he testified it was used against a defendant. Now, he is suggesting it was used by a defendant. I don't follow it.

THE COURT: That is what his testimony is.

MR. AGOGLIA: Okay.

Q Would you tell us about, Mr. Yannacone?

A Do you want the last time I heard the phrase?

Q If it touches upon either defendants in this case or plaintiffs in this case, we want to hear about it, and, excuse me, I think we have a right to hear about it.

A The last time I heard the phrase used with reference to any of the parties in this litigation was by Mr. Clement and it was directed towards my activities.

Q Before that --

MR. AGOGLIA: Your Honor, may I move to strike that, please?

THE COURT: I will strike that.

Now, let's have it. Anytime when you say Mr. Clement used it regarding any of the plaintiffs in this case.

A (Continuing) Before that, it was a regular topic of discussion at the same times we discussed the documents or writings of Dr. Jukes and, occasionally, Dr. White-Stevens, dealing with the subject matter of our EDF activities.

Q Dealing with the subject matter of how to silence them, isn't that right?

A That's correct.

MR. AGOGLIA: I object as being leading and suggestive.

THE COURT: That was unnecessary. The motion is granted.

Strike the question.

MR. ROTHWELL: I'm sorry, I have no further questions.

CROSS-EXAMINATION

BY MR. AGOGLIA:

Q Mr. Yannacone, just a few questions, if I may.

I think this policy of preparing for litigation would be another way of describing what you have been talking about.

Would that be a fair and accurate statement?

A Yes.

Q Okay. In other words, if you are going to cross-examine a skilled expert, you, as a layman, a relative layman in the field of, let's say, pesticides, you would have to prepare yourself by getting all the writings available of that person, studying them, analyzing them, and then prepare yourself, arm yourself for cross-examination.

Isn't that what you did and did it rather successfully, I may add?

A Yes.

Q You don't find anything wrong with that, do you, sir?

MR. ROTHWELL: Your Honor --

THE COURT: You can redirect.

Q Do you find anything abhorrent or obnoxious in that?

A No, of course not, that is my duty as a trial counsel.

Q That was your duty as attorney for the Fund to prepare yourself, by arming yourself with literature that had been written, would that be a fair statement?

A Of course.

Q There was some talk about Dr. Jukes and getting his scientific papers, is that not so?

A That's correct.

Q And that was assigned to two doctors, the names escape me now, but one is from the Stony Brook University?

A That's correct.

Q And then you asked Mr. Clement to get any writings that had been given to newspapers in a non-scientific area, is that correct?

A That's correct.

Q But those Mr. Clement did get to you but the scientific papers were not produced, would that be a fair statement?

A No.

Q Did you get certain writings, sir, that Dr. Jukes had written to newspapers and non-scientific articles?

A I got the letters to the newspapers.

Q Okay, and would it be that Mr. Clement had got that or someone else?

A They came through Mr. Clement from the National Audubon Society.

Q That was the specific assignment you had given him, isn't that true?

A That was part of it.

Q And the other part was given to two other men to get scientific journals, I think that is true, isn't it?

A The scientific literature was to be obtained by Dr. Wurster and Dr. Smoker at the State University. All of his public utterances other than the scientific journals were to be obtained through the National Audubon Society research people.

MR. AGOGLIA: Okay, thank you very kindly.

MR. ABRAMS: I have no questions.

REDIRECT EXAMINATION

BY MR. ROTHWELL:

Q Did they produce the material?

MR. AGOGLIA: I am not concerned about the parties. If they are incorporating doctors, as well as Dr. Clement, I have an objection. If it is only Dr. Clement, I have no objection.

THE COURT: You didn't specify in your question, did they produce the material solely as to a plaintiff or defendant.

Q Did they produce the material as to Dr. Jukes?

A No.

MR. ROTHWELL: No further questions.

THE COURT: Mr. Agoglia asked you whether it was proper to educate yourself for the purpose of winning a lawsuit.

I gather these conversations that you talked abou about had nothing to do with winning a lawsuit, they had to do with using the lawsuit as a vehicle for attacking the credibility of certain people?

A THE WITNESS: That's correct.

THE COURT: In addition to winning a lawsuit?

THE WITNESS: That's correct.

THE COURT: So these material that you were educating yourself on in this regard was not to win that particular lawsuit but to possibly attack the credibility in the scientific community of certain individuals without regard to winning or losing a lawsuit?

THE WITNESS: Yes, if they had taken the media to -- or we believe this led the media and we had no access to the media to get back.

THE COURT: All right, you may step down.

MR. AGOGLIA: May I just develop that, your Honor.

BY MR. AGOGLIA:

Q Mr. Yannacone, just a minute.

You talked about gathering this material so when the doctor testified in varous lawsuits where you were involved with the environment, you would be prepared, is that correct?

A That's right.

THE COURT: Wait a minute, I think we are getting mixed up.

MR. AGOGLIA: I wanted to take it a step further.

THE COURT: We are talking about here where they induced one of these so-called opposition scientists to get into that lawsuit to testify and they would use the lawsuit as a means of destroying the credibility of that witness unrelated to the merits of the lawsuit. That is what he said here.

MR. AGOGLIA: May I follow up, sir?

THE COURT: Sure.

Q Mr. Yannacone, when you say "destroy the credibility," you are talking about the scientific credibility in that they had taken a position which you by cross-examination had discredited?

Would that be a fair statement?

A Yes, as far as it goes.

Q When they did that, if they persisted in this statement that DDT is good for the public, you would mail to the press the copy of the examination and cross-examination to show you had seriously impaired the scientific credibility of that particular person.

Would that be a fair statement?

A No.

Q You didn't do it that way?

A No.

Q After the testimony was done, sir, did you have like a transcript of it?

A That's correct.

Q If that person persisted in what you felt in good conscious you had established as an unjust scientific position, did you then mail literature to the press?

A No.

Q How did you do it, sir?

A The guiding rule of the three years that I was associated with the Environmental Defense Fund was that the environmental Defense Fund or any group or scientist associated with it would not, under any circumstances, solicit the press, go to the press, issue a press release, make a formal statement to the press.

If the press inquired in connection with litigation matters actually pending or past, we were --

Q Or past, did you say?

A Past, terminated -- we would furnish the press with whatever they wanted, including extracts, excerpts or the whole record of testimony of witnesses who had made off-the-record statements that we felt were contradicted by the record developed during the trial.

During the three years that I was there, we never went to the press; the press came to us.

Q Okay. I didn't mean to suggest you went to the press.

A There is a substantial difference.

Q When the press came to you, that is the way you did it?

A Yes.

MR AGOGLIA: Thank you kindly. I have nothing further.

THE COURT: Thank you, Mr. Yannacone.

(Witness excused.)

THE COURT: Next witness.)

MR. ROTHWELL: Call Mr. Maurice Freedman.

MAURICE FREEDMAN, called as a witness by the Plaintiffs, being first duly sworn, testified as follows:

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. ROTHWELL:

Q Mr. Freedman, would you state your address?

A 158 Landsdown Avenue, Westfield, New Jersey.

Q Would you tell us what your employment is?

A I am employed by the New York Public Library.

Q In what capacity?

A I am Coordinator of Technical Services.

Q Mr. Freedman, I'm sorry, when you talk --

THE COURT: Mr. Freedman, sit back, take your time, and you have got to talk slowly because while we have expert reporters, they are the best in the country, they can't hear you, if you don't speak up.

A I am Coordinator of Technical Services for the Branch System of the New York Public Library.

Q Could you describe for us your background and qualifications for this position, starting, let's say, with your undergraduate degree, if you had one?

A I have a Bachelor's Degree from Rutgers University in Newark, New Jersey; Master's Degree in Library Science from the University of California at Berkeley. Upon completion of the Master's Degree in Library Science, I was selected by the Library of Congress for their special recruitment program for outstanding library school grads.

I served at the Library of Congress in a variety of administrative positions for three years. I went from the Library of Congress to the Information Dynamics Corporation in Reading, Massachusetts, an information systems firm. I was there one year and before coming ot the New York Public Library, I worked at the Hennepin County Library in Minnesota, in suburban Minneapolis Library System.

I have been at the New York Public Library in my present position for approximately a year and a half.

MR. ROTHWELL: Your Honor, I tender this witness to the Court as an expert in the field of library science, and --

THE COURT: Any objection?

MR. ABRAMS: I object, your Honor. I don't believe there is any need for a witness expert on library sciences.

THE COURT: Overruled.

MR. ROTHWELL: Thank you, your Honor.

BY MR. ROTHWELL:

Q Do you have familiarity with scholarly research and the methods thereof?

A Yes.

Q Would it be fair to say that part of your activity is assisting scholars with research and providing and keeping on-going resources for scholars and students and those who use the facilities of the repository of the printed word we call "libraries"?

MR. AGOGLIA: I object. I don't know what it calls for; only as to form.

THE COURT: Overruled.

Will you answer, please?

A That's correct.

THE COURT: Why don't you tell us what it is all about so we understand it.

THE WITNESS: Libraries are in the business of providing services to scholars, to readers, to lay people. That's been their function in civilized worlds, civilized nations.

Q Mr. Freedman, I hand you an article, or copy of an article from the New York Times, August 14, 1972, marked Plaintiffs' Exhibit 1 for identification, and ask if you are familiar with that and have you read it?

A Yes, sir, I have.

Q And it is true, isn't it, that you were retained by plaintiffs' counsel in this matter and provided with this exhibit and asked to do certain things in reference thereto?

A That's correct.

Q In your own words, can you tell us what you did in reference to this Exhibit 1?

A Well, there were two different kinds of research that I did. One was working with, in effect, a manual product, the index to the New York Times, a printed volume, that I looked up the names of the professors, Drs. Jukes, Edwards and White-Stevens in the index which is noted as a book of record.

And I found citations for their names which referred me to the term "birds." I then looked under the term "birds" in the index to the New York Times, this is the 1972 Volume, and under that term "birds," along with a number of other abstracts, was an abstract of this article. The article cited the August 14, 1972 article. There was an abstract of that article. That was one of the areas of the research.

Q Just a moment, Mr. Freedman -- I have a little housekeeping businessto do here.

A Okay.

Q I hand you a document marked for identification as Plaintiffs' Exhibit 20 and ask if that contains the excerpt of which you speak together with other information provided by you?

A That's correct.

Q All right. Now, just hold on.

MR. ROTHWELL: I offer Plaintiffs' Exhibit --

MR. ABRAMS: I do object, your Honor. It is a separate publication, not the basis of the lawsuit.

THE COURT: I gather it is not being offered for that purpose.

MR. ABRAMS: I don't know what purpose it is being offered for.

MR. ROTHWELL: It is being offered for damage purposes only, your Honor.

THE COURT: Let me see it.

Objection sustained.

Q Did you --

A There was a second area of research I did. One was with the printed index, the other was in the New York Times Data Bank. It is a computer based system that allows for computer look-ups of various terms and names and I looked up the individual doctors' names as well as --

Q What individual doctors' names?

A Dr. Jukes, Dr. White-Stevens and Dr. Edwards, and, in addition to those names, I also looked up Robert Arbib, Jr., American Birds, Pests and Pesticides, and National Audubon Society.

Using the computer service, which I did at the Queens Bureau Public Library, which is a New York Times Data Bank, I was referred back to this original article and in addition, reviewed -- pretty much identical version of that abstract, which was in the printed version.

Q Do you know the circulation of the New York Times on August 14, 1972?

A Nine hundred --

MR. ABRAMS: Your Honor, the circulation has been stipulated to.

THE COURT: Tell the jury. They don't know. What is it?

THE WITNESS: 950,513.

THE COURT: All right.

THE WITNESS: Plus 12,362 foreign.

MR. ABRAMS: You are almost right. On August 14, 1972, the circulation was 962,672, 12,362 foreign circulation.

THE COURT: We will accept the witness' statement.

BY MR. ROTHWELL:

Q How many countries were involved in the foreign circulation, do you know that?

A 9300.

Q 9300, thank you.

Mr. Freedman, going to that Exhibit 1, you know, the August 14, 1972 article --

A Yes, sir.

Q Have you described or can you tell us anything more about how the contents of that article are subsequently available to scholars and researchers and students and historians, and so forth? How are they available?

A Well, the articles available, to my knowledge, were in three formats.

Q Three forms?

A Three formats.

Q Formats.

A Three formats. One is the actual paper itself, the newspaper you buy on the stand, the New York Times as a newspaper.

Most libraries that serve scholars and any kind of academic pursuits and -- well, most libraries have the New York Times in microfiche.

Now, in connection with its data bank service, they also have it in another format called microfiche. It is just a slightly different layout, but these are the three that I am aware of and the libraries collect and save.

THE COURT: I don't understand the third, the libraries have these data banks.

THE WITNESS: The libraries that have the data bank service.

THE COURT: Oh, that have data bank service. That means you could ask someone to go to the Times data bank computer and take it out, is that what you mean?

THE WITNESS: What happens is the Times data bank in the computer contains a reference to the article on microfiche, so if you were not to see the whole article, you have to go pick up the piece of microfiche and look at it that way. It does not refer back to the Times on microfilm. That's all.

Q Well, the data bank available, where are the terminals located?

A There are many libraries that have it, not as many, though, as have The New York Times on microfilm. Most any library of significance will carry The New York Times on microfilm plus the current newspapers.

Q How long are these records kept by the libraries and the research institutions?

A The collection policy of the newspaper itself, the hard copy newspaper, will vary with individual libraries from 30 days to a year.

Q Just a moment. You say the hard copy?

A The newspaper itself will vary 30 days to a year, depending on the facilities, but for microfilm, that can be kept indefinitely. It is considered an historical document of enduring and continuing research value, and the library just continues to collect it and save it.

Q Could you comment, give us your comment and professional opinion on the status or stature of The New York Times and its reference service, did you say through the year back -- what was the name that you gave the index?

A The New York Times index is sub-titled a Book of Record.

Q A Book of Record. And the microfilm products you described and its micro-feiche process you described as a product of the computer age, can you give us your professional opinion, Mr. Friedman, as to the status, the stature of these source materials from The New York Times among libraries, among scholars, among historians, and among other researchers? Would you give us your professional opinion on that?

A Well, in the book The Kingdom and The Power by Gay Talese, a book about The New York Times, page 336, it says --

MR. ABRAMS: I would like not to have the witness praise.

THE COURT: We are not interested in what somebody wrote in a book. You are being asked --

THE WITNESS: My opinion. Well, I consider it is the newspaper of record and it is inconceivable to me as a library -- you asked about scholars and academic institutions -- it would hardly be accredited without The New York Times, without the collection of The New York Times on microfilm as part of its library collection.

Q You talk a little too fast for me.

A It is hard to conceive of an academic institution concerned with accreditation not having The New York Times for scholarship, for research, for students; it is an in-valuable source; it is the most comprehensive newspaper published in this country in terms of what it carries and its reputation amongst librarians and institutions in my opinion is of the highest.

THE COURT: May I see counsel at the bench.

(At the side bar.)

THE COURT: Do you want to introduce these now?

MR. ROTHWELL: I just want to introduce these in evidence, and this is the last witness I can do it through.

MR. ABRAMS: I strongly object.

THE COURT: You are referring to Exhibits 22, 24 and 25?

MR. ABRAMS: Yes. These are separate publications by different newspapers. The Times as a matter of law is not responsible for them, and it would be highly prejudicial before the jury.

THE COURT: How are you going to get them in?

MR. ROTHWELL: They are admissible, since they emanate from The New York Times wire service to show the extent of the circulation on the issue of damages only. I am not trying to end-run the single publication rule. That is not the purpose of this.

THE COURT: It seems to me that you might get in the number of subscribers to the wire service, but not the distribution those people get. I think you are liable for that.

MR. ABRAMS: The wire service is owned by a different company, a different subsidiary than The Times; it is not even owned by the defendant in this case. Secondly, we do have a case back at the table which indicates that if there is a reprint by another newspaper of what the first newspaper prints, it is inadmissible and is, indeed, reversible error, because it is so prejudicial.

THE COURT: Even though you gave it to them pursuant to contract?

MR. ABRAMS: The case I have is not that case. I believe the case would also stand for that, but the case I have is different.

THE COURT: This is, according to the heading, The New York Times Service, and at least on its face seems to indicate that you have furnished this to the newspaper pursuant to contract for which you were paid.

MR. ABRAMS: The New York Times news service is a separate function performed by a separate company.

THE COURT: I will sustain the objection. I am sustaining it mainly because the implication of another couple of hundred thousand readers of this is involved. He is entitled to show the people who subscribed, which might be another thousand or two, but the possibility of a huge number outweighs the number of subscribers.

MR. ROTHWELL: The number of subcribers to the news wire?

THE COURT: That is not what you offered it for.

MR. ROTHWELL: No.

MR. AGOGLIA: It could not be admissible against me, since I am not a party to that.

THE COURT: He is not even offering it against you.

MR. AGOGLIA: I thought he offered it against both.

THE COURT: Are you offering it against him?

MR. ROTHWELL: Under the second claim.

THE COURT: Under the claim that they furnished the information? It might be, but I ruled it out, anyway.

(In open court)

B2 BY MR. ROTHWELL:

Q Just a couple of more brief points, Mr. Friedman.

Are you familiar with The New York Times wire service or news wire service?

A Yes, sir.

Q Could you tell us what that does?

A Well, the wire service provides stories, New

Times stories, makes them available to newspapers all over the country and in Canada as well.

Q Do you call these subscribing newspapers?

A Yes.

Q Do you know how many of those The New York Times had in August of 1972?

A I believe 336.

Q You have got the wrong number.

THE COURT: Mr. Abrams?

MR. ABRAMS: 236.

THE WITNESS: My apologies.

Q And the subject matter of this August 14 article, was that sent over the news service to 236 newspapers?

A Yes.

THE COURT: I am going to tell the jury now: If you ever get to the question of damages, you can't take into consideration the number of people who may have read 236 newspapers throughout the country. If you want to add 236 to 900-odd thousand, you can, but that is as far as you get with that line of questioning. I thought we decided that at the bench.

Q Could you give us your professional opinion about the relationship between circulation and readership of The New York Times?

A The circulation is a statement of how many papers were printed and available; the readership is far in excess of the circulation. In libraries, many, many more people or more than one person reads the newspaper in a library. Libraries have the newspapers available to many people. And it also goes for the family and the home, more than one person reads the newspaper.

MR. ROTHWELL: Thank you. That is all.

MR. AGOGLIA: No questions.

MR. ABRAMS: Mr. Friedman, thank you for coming up.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Are you finished?

MR. ROTHWELL: No, I am waiting for the Court's instructions. You want the next witness?

THE COURT: Yes.

MR. ROTHWELL: Mr. Marvin.

PHILIP H. MARVIN, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROTHWELL:

Q Will you state your address, please?

A 1730 Skyline Drive, Lincoln, Nebraska.

Q Will you state your business? What business are you in?

A Consultant in crop protection.

Q What does that entail?

A Primarily that entails investigating claims of injury from pesticides.

Q Injury to what?

A Injury to crops, injury to adjacent vegetation, injury to animals.

Q Would you state for us your educational background, please, your academic qualifications?

A College, undergraduate work at the University of Connecticut, with a major in entomology and a minor in botany; graduate study leading to a Master's Degree at the University of Minnesota, major in entomology, minor in plant pathology.

Q While at the university did you continue your studies?

A Yes.

Q In more than one course?

A Yes.

Q Could you state for the record also your relationship to the subject of ornithology, that is, the study of birds.

A That came naturally, partly through my father being an instructor in biology in high school, through a tolerant mother who allowed me to have several wildlife animals around the house; I had time to roam the woods of Connecticut; I have been interested in various phases of zoology, including ornithology. During college days and since college days I have participated rather frequently in what is known as the Christmas Bird Census.

Q Is there a relationship between entomology, which is the study of insects, and ornithology, which is the study of birds, and, if so, please tell us?

A There is a tie-in ecologically with all living things that are in the same environment. When birds and insects are in the same environment there is a connection there. It may be direct or it may be indirect, but it becomes involved. People living together in the same environment have an influence on each other to various degrees.

Q I think you have answered the question. Let me ask you a preliminary question.

Have you written and published on the subject of birds in any scientific journal?

A Yes.

Q I hand you a document that has been admitted subject to connection, Plaintiffs' Exhibit 16, and I ask you if you can identify that?

A Yes.

Q Did you write that?

A I did.

Q Did you utilize statistical techniques in writing that article?

A I did.

Q On what primary data source was this article based?

A On information supplied by The National Audubon Society.

Q In what form?

A In reporting what the Christmas Bird Census were in relation to the number of birds observed.

Q Are you also familiar with Exhibit 1 in this litigation, which is the August 14, 1972 article by Devlin in The New York Times?

A Yes, I am acquainted with that.

MR. ROTHWELL: Your Honor, I have these exhibit numbers mixed up. May I re-form that question to read Plaintiffs' Exhibit 2, rather than 1?

Q I hand it to you, Mr. Marvin, and ask you if you are familiar with the material in the first column, and if you want to take a minute to review it you may.

A Yes.

B3 Q In terms of the application of this language that you have just read to the plaintiffs in this action, would you say that this language, the charges contained in here, are true or false?

MR. AGOGLIA: I don't know what he is referring to in the article.

THE COURT: I think you'd better be more specific There are too many statements made in the article. Which ones are you interested in?

MR. ROTHWELL: I want to get this man's opinion and view in reference to the phrase "with the increased coverage of Christmas Bird Count by the press, it was important for Christmas Count spokesmen to 'reiterate what we are seeing is not more birds but more birders.

'Anytime you hear a "scientist" say the opposite' he continued, 'you are in the presence of someone who is being paid to lie, or is parroting something he knows little about.'"

Q Now, in reference to that statement, the sentence that contained the words "paid to lie," as applied to the plaintiffs in this action, is that a truthful statement?

MR. AGOGLIA: Objection.

THE COURT: Overruled.

A No, it is not a truthful statement.

THE COURT: Why isn't it a truthful statement?

THE WITNESS: It is not a truthful statement because it includes me.

THE COURT: I am not worried about that. I want to know factually why it is not a truthful statement.

MR. AGOGLIA: May I ask that that be stricken, please?

THE COURT: Overruled.

THE WITNESS: Because in making up my own observations as to the number of robins, for instance, since the '50s under the Nebraska-Kansas conditions there has been an increase in the number of robins, I am convinced. Outside my own home there is a hackberry tree. A hackberry bears small fruit, the seed of which is rather hard. It will remain on the tree until wintertime. Robins, among other birds, will feed upon that dried fruit and drop the pits onto the ground. But even more, robins will drop their purple droppings onto the ground. I have seen it around my own home and around the courthouse square, and you must visualize, if you will, in the mid-west many of the courthouses are built right in the middle of a block; it entails a whole block. The trees generally line the block. In the town of Clay Center, Kansas, they have hackberry trees all around, and underneath the hackberry trees the ground is purple with the droppings from robins. People walking through there would have their clothes stained with the droppings of robins.

In making the Christmas Census, we saw increasing numbers of robins each year. Ecologically I figured that we have had more suburbia, more areas for robins to nest themselves, to feed; these are not deep woods, but the open woods, or, actually, what we now call suburbia. And the increase in robins was due to more nesting sites and more feeding sites for them.

But, increasingly, over the years, my own observations say that robins have increased.

Then there is the red winged blackbird. I recognize that that has increased as well, increased from my own observations, but even more from the reports of farmers who are losing crops to the red winged blackbirds and other blackbirds. So I have realized that they were increasing.

One of the insects of extreme importance in that area of Kansas is called the army cut worm, and one of the indications that army cut worms are in the field are the number of crows. And increasingly we have seen more crows in that respect.

We have an insect in the lawn called the sod web worm, and the starlings are quite effective in picking the larve of the sod web worm out of the lawn. And, again, the increased number of starlings was evident. Do you want more?

Q No, that will be enough. I presume you could continue for a long while on that vein. But are you familiar Mr. Marvin, with the plaintiffs' positions and statements relating to the Audubon Christmas Bird Counts?

A Yes.

Q Are those statements truthful and accurate?

MR. AGOGLIA: Objection, your Honor.

THE COURT: I don't know what statements you are talking about.

MR. ROTHWELL: Your Honor, that question has to be in terms just as general and vague as the statements in Exhibits 1 and 2.

THE COURT: No, Exhibits 1 and 2 give some factual material upon which the defendants have drawn a conclusion. I don't know what these plaintiffs have said which this witness relies upon. I have heard Dr. White-Stevens testify that he thought that the bird count showed no decrease in population, and he so stated that to

Mr.Devlin. But that is the only thing I know of.

(Pause)

Q Mr. Marvin, my apologies for the delay. I hand you Plaintiffs' Exhibit 14, which is in evidence in this case, and it contains an article by Dr. Jukes entitled "DDT, Human Health And The Environment."

Have you read that article?

THE COURT: For the record, let us identify its date.

MR. AGOGLIA: I didn't hear what exhibit he is referring to.

MR. ROTHWELL: No.14.

B4 Q You have read that article, Mr. Marvin?

A I have just briefly scanned it.

Q I thought you were just reviewing it. I asked you if you had seen and read this.

THE COURT: Have you seen that article before?

THE WITNESS: No.

Q How about this one, "DDT, The Chemical of Social Change," have you read it?

A I do not believe so.

Q I asked you a few minutes ago were you familiar with the plaintiffs' statements and positions relating to bird count.

MR. AGOGLIA: Objection, if your Honor please.

THE COURT: I will let that statement in.

MR. AGOGLIA: What statement is he referring to?

THE COURT: We are going to find that out in the next question.

THE WITNESS: Will you repeat that, please?

Q Just a few minutes ago I asked you if you were familiar with the plaintiffs' positions and statements in reference to bird count, the Audubon Christmas Bird Count data, and I asked you if you are familiar with those statements.

A Yes.

Q Now, what statements are they that you are familiar with?

MR. AGOGLIA: Keep your voice up, please, sir.

A I am of the opinion that as far as the --

MR. AGOGLIA: Objection as not responsive. The question is, what statements.

THE COURT: What statements are you relying on?

THE WITNESS: I am relying on the statements that they have made --

MR. AGOGLIA: No, no.

THE COURT: We want to know the specific statement. You see, we don't know what statements they have made.

We only know what statements they made when you tell us. So far you were shown two articles. You say you have not read those. We know they made those statements, but you have no read them? Right?

A Right.

THE COURT: We will have a short recess.

(Jury excused.)

THE COURT: We have to know the statements, otherwise how could he be cross-examined by counsel. I don't know what he read. I heard Dr. White saying what he said in his telephone conversation with Mr. Devlin. I don't know what anybody else said about the bird count. You showed the witness some articles, but he said he has not read them. We will have a short recess.

(Recess)

(Continued on next page)

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THE COURT: Proceed, please.

BY MR. ROTHWELL:

Q Mr. Marvin, I am going to read you a statement taken from Audubon Exhibit No. 2, which is an attachment to a letter dated August 8, 1972, written by Dr. White-Stevens to Mr. Devlin, and these documents are in evidence in this case.

I am going to read you the following, taken from the Clipper Magazine, American Airlines publication, about which we already have testimony from Mr. White-Stevens. The quote I want to read to you is as follows:

"Contrary to the oft-quoted myth initiated in Rachal Carson's 'Silent Spring' where the main concern was over the alleged rapid decline in bird life in America, careful bird counts made over the entire country and published by the National Audubon Society reveal that amny favored species of birds have actually increased in numbers in many areas of the country, thus, robins, starlings, sparrows, sea gulls, ducks, wild turkeys, blue jays, cardinals pheasants, quail and grackles have all increased at least twofold, and some more than fortyfold in the past 25 years since the organic pesticides (including DDT) were widely introduced.

"Surprisingly, a number of raptorial species (hawks) which being at the top of the carnivorous food chain are alleged to being rapidly poisoned into extinction, have also shown that they are either holding their own or are increasing. Unfortunately, several do show a steady decline and include among their number Cooper's hawk, golden eagle and the peregrine falcon.

"These declines, however, appear to be more related to the encroachment of man's civilization upon their wild breeding and feeing haunts than upon the direct effect of any pesticides. Certainly, the peregrine falcon was driven from the Hudson River escarpments by man's intrusion long before DDT.

"In many careers of the world, this superb raptor has shown a decline regardless of whether DDT was used in its environment or not."

I ask you, Mr. Marvin, if this statement by Dr. White-Stevens is a true statement, in your opinion.

A Yes.

Q Thank you.

Mr. Marvin, the next one I am going to read you is from Plaintiffs' Exhibit 14, which is an attachment to the Jukes' letter of August 7, 1972, written by Dr. Jukes to Mr. John Devlin.

The statement is a short one and it reads as follows:

MR. ABRAMS: Mr. Rothwell, could you tell us what you are reading from, please.

MR. ROTHWELL: "The Chemical of Social Change," page 63, which is an attachment to Plaintiffs' Exhibit 14.

Q I am now quoting:

"Actually, there is little or no evidence for a decrease in the numbers of land birds attributable to DDT. The probability is trong that increases in the numbers of certain species of common birds, such as redwing blackbirds, may have resulted from the destruction of insect vectors of bird diseases."

Is that a true statement?

THE COURT: Would you first define for us what is meant by "insect vectors"?

THE WITNESS: Excuse me. The question?

THE COURT: The article refers to "insect vectors." What are "insect vectors"?

THE WITNESS: Insect vectors would be insects which transmit disease organisms from a diseased bird to a healthy bird.

Q Now, do you still have in mind that brief statement I read from Dr. Jukes' article?

A Yes.

Q Is that a true statement?

A In my opinion, yes.

Q I show you an open letter on the subject of Bird Reproduction and Abundance, written by Dr. J. Gordon Edwards.

Have you read this?

A Yes.

MR. ROTHWELL: Your Honor, this is not in evidence but, if necessary, we will make an offer.

THE COURT: It has to be in evidence. Offer it.

MR. AGOGLIA: May we see it?

THE COURT: Show it to defense counsel.

(Document handed to Mr. Agoglia.)

MR. AGOGLIA: Your Honor, may we have a moment, please. This has not previously been marked.

(Pause)

MR. AGOGLIA: I have no objection.

MR. ABRAMS: No, objection, your Honor.

MR. ROTHWELL: Plaintiff offers Plaintiffs' Exhibit No. 26 into evidence, your Honor.

(Plaintiffs' Exhibit 27 for identification received in evidence.)

BY MR. ROTHWELL:

Q And you have said that you read this, you are familiar with it, Plaintiffs' Exhibit 26?

A Yes.

THE COURT: What is the title of that?

MR. ROTHWELL: This is titled, your Honor, "Open Letter, Bird Reproduction and Abundance," published by a group called Sponsors of Science, and it bears the typewritten name of J. Gordon Edwards, President, San Jose State College.

THE COURT: Go ahead.

Q I read you a quote from this Plaintiffs' Exhibit 26 as follows:

"In addition to the general lack of specific correlations between" --

A Excuse me, sir, would you repeat that?

Q I'm sorry.

MR. AGOGLIA: Would you speak a little louder, please. I'm terribly sorry. You have your back to me and I don't hear.

Q "In addition to the general lack of specific coorelations between DDT and bird declines, we are impressed by the abundant evidence of population explosions of many kinds of birds which are correlated with DDT use and with the concomitant use of various other chemicals and developments."

Is that a true statement?

A Yes.

Q I will read you one more from this same exhibit. It says in paragraph 5, page 4:

"Overall, the Audubon counts show 26 species of birds have increased from 90.8 birds seen per observer in 1941 to 971.4 birds seen per observer in 1960."

Is that a truthful statement?

A Yes.

Q Just one more brief matter.

You testified earlier that you had participated in bird count activities.

A Right.

Q Frequently?

A Yes.

Q Have you ever participated with any of the defendants in this case?

A Not that I recall.

Q Roland Clement?

A I have been at a meeting with Roland Clement; whether bird counts were included in a field trip with him or not. I am not positive.

Q Oh, you took a field trip with him, is that it?

A I believe it was on a field trip with the Delaware Valley Ornithological Club.

MR. ROTHWELL: Thank you, not further questions.

THE COURT: You say you participated in bird counts.

Were they bird counts conducted by the Audubon Society, its so-called Christmas Bird Count?

THE WITNESS: I believe I qualified it that I was not positive whether it was a bird count or a field trip.

THE COURT: No, not this one. Earlier in your testimony, you stated you participated in Christmas Bird Counts.

Are those the bird counts conducted by the Audubon Society?

THE WITNESS: Yes, sir.

THE COURT: All right. You may cross.

CROSS-EXAMINATION

BY MR. AGOGLIA:

Q I am going to read from the foreward of Mr. Arbib, one paragraph above what was read, and I am going to ask you, sir, if you agree with this statement contained therein.

A Would you speak a little more -- I am not accustomed to your type of accent. Excuse me, sir.

MR. AGOGLIA: I never lived in Kansas. All right, forgive me, sir.

Q I am going to read a statement which is one paragraph above the foreward from American Bird that had been previously read and I want to ask you if you agree with it; okay?

A Right.

Q Thank you, sir. I will read slowly:

"The apparent increases in numbers of species and individuals on the Christmas bird counts have, in most cases, nothing to do with real population dynamics. They are the result of ever increasing numbers of birders in the field, better access to the count areas, better knowledge of where to find the birds within each area, and increasing sophistication in identification."

Would you agree with that statement, sir?

A No.

Q You disagree with it, completely and entirely?

A No.

Q Okay. Has there been an increase in the sophistication of identification?

A Quote it again. You were doing swell, now --

Q Has there been an increase, sir, between, let's say, 1941 and 1960 in the sophistication of identification of birds?

A There may be.

Q Well, when you say "may be," sir, could you explain that to me?

A Birders that I have known, previous to 1950, have been excellent birders. There was a Mr. Saunders in Connecticut, and I have bird with him. I have bird with people in Minnesota, and I am thinking now of one specific bird, a cerulean warbler, and here is a man who had not heard a cerulean warbler for twenty years and when he had heard the tone, he identified it immediately.

Q Do they use tape -- are you finished?

A What is that?

Q Are you finished? Are you finished with your answer?

A No.

Q Okay. No, what I am saying is that people I have bird with at that time were on an average much better birders than the average birder that I have been with during the Sixties.

Q Do you know how many people participated in the Christmas study that was reported in the April 1972 edition of American Birds?

A No.

Q Do you know anything about their technique?

A Yes.

Q You do? Do you know what type of equipment the number of people that participated used?

A If you mean are they using binoculars?

Q Binoculars.

A Telescopes and the like?

Q Recording devices, et cetera. Do you know if they did that?

A Yes.

Q You do know it?

A I know as far as binoculars and as far as telescopes, I would be very sure. I did not participate in that year. I was not with the group. But I would make the assumption with the other times I have been with the people that they use such equipment.

Q Sir, could you tell his Honor and the members of the jury about what percentage of the area of the U. S. is covered in the bird count?

A No, I could not.

Q Would 1.5 percent be consistent with your understanding?

THE COURT: He said he had no understanding.

Q Perhaps I can refresh --

MR. AGOGLIA: Forgive me, your Honor.

Q You have no idea of the number of people who participated in the 1971, December 1971 Christmas Bird Count, do you?

A If you say idea; as far as absolute numbers I could not quote.

Q Could you give us an approximation?

A No, I could not give an approximation.

Q Would it in your judgment be more than 5,000 or less?

A I would not say.

Q Do you have any idea one way or the other?

A Yes, I have an idea.

Q Would you say it was more or less?

A I would say it is more.

Q Substantially more or a bit more or what, could you further refine it?

A Well --

Q Let me finish my question, please.

A Go ahead.

Q Could you further refine it for us?

A No, I could not.

Q 18,798 participants, would that surprise you?

A No, it would not surprise me.

Q Do you agree with the following statement, sir, that between 1940 and 1961, or certainly by 1972, we had better access to various areas of the country to make our studies? Would you agree with that statement? Just the word "access" now.

A Yes.

Q Would you agree with the statement that by certainly 1972, in comparison to 1940, we had better knowledge of where the birds would be nesting; would that be a fair statement, in your opinion?

A Yes. But may I qualify that.

Q If the Judge permits it, sir, you may. I don't run the court.

THE COURT: You may.

A You said, do you have an idea where the birds are nesting. And, of course, the Christmas census has no relationship to the nesting.

Q Do we have better access, sir, better knowledge as to where to find the birds during the count time? Would you agree with that statement?

A Yes.

Q And that's been sophisticated year after year after year, wouldn't that be true?

A Yes.

Q In other words, we get better every year, we don't go backwards, do we?

A Excuse me, I didn't get the last phrase.

Q We don't go backwards in the count business, we progress each year with better technique and more sophisticated people going out in the field of this eighteen thousand some odd?

A I would not say more sophisticated.

Q You told us about two of your people who were as sophisticated in 1940 as they were in 1960. We are talking about 18,000, the great majority of which you have no idea of their qualification or techniques, isn't that true?

A Yes.

Q Now, were you ever a member of the American Ornithologist Union?

A No.

Q Do you know what that is, sir?

A Yes.

Q Could you tell his Honor and the members of the jury, please, just very briefly?

A The people I know that have belonged to the

Union --

Q Tell us what it is, sir. What is the Union?

A The Union is made up of people.

Q And is it a society of Ornithologists?

A Yes.

Q And do they have to qualify for membership in it?

A I do not know.

Q Had you ever been invited to join the Union?

A Yes.

Q And did you participate at all in the American Ornithologist Union or any of their activities?

A No.

Q Have you ever published a scientific article in an ornithological publication?

A No.

Q Have you corresponded with Mr. Clement, whom you know, concerning the bird count statistics?

A Yes.

Q And would it be fair to say that you and he had discussed it in great detail about the non-reliability of these counts?

A Would you repeat that?

MR. AGOGLIA: Would you be kind enough to repeat the question, if I have the Judge's permission.

(Question read)

A Since you said in great detail, I would qualify my answer by saying no.

Q You did discuss the subject matter with him?

A Through letters, exchange of letters.

Q And did he indicate to you as an officer of the Audubon Society that it was not proper to rely upon the Christmas bird counts because of the variables involved; has he made that statement to you on a number of occasions in writing?

A No.

Q Has he ever made it to you?

A Possibly, yes.

Q Do you know how many times, sir, he would have made that; could you tell us that? Was it more than once?

A I recall receiving only one letter from him.

Q Now, you say you were familiar with this document, which we, as lawyers, call Exhibit 26, that was the statement of Dr. J. Gordon Edwards, right?

A Right.

Q Would it be fair to say the first time you ever saw or heard of this was at the recess about ten, fifteen minutes ago out in the hall?

A No.

Q No? Did you discuss various papers including this one with your lawyers out in the hall?

A Yes.

Q Did you read this entire thing --

THE COURT: He does not have lawyers. Not with his lawyers; he is a witness.

Q With the lawyers for the plaintiffs, did you discuss out in the hall with them the contents of this document?

A Would you repeat that question?

Q Did you discuss the contents of this document with the lawyers for the plaintiffs in the hallway at the recess?

A Not the entire document.

Q Did you discuss eggshell thickness with him?

A Did I discuss --

Q Eggshell thickness; did you discuss that fact with the lawyers for the plaintiffs in the hall at the recess?

A No.

Q Are you familiar with the studies done on eggshell thickness, the effect of DDT on eggshall thickness and its ultimate effect on bird population and bird statistics?

MR. ROTHWELL: May I again interpose an objection?

THE COURT: No; overruled.

Q Sir, you say you are a consultant in crop protection, and you do pesticide investigations, is that right?

A Yes.

Q And for whom do you do this work?

A I may do it for a farmer, I may do it for a neighbor to the farmer, I may do it for a commercial applicator, I may do it for an insurance company, I may do it for an attorney, I may do it for a combination of any one or two or three of the groups.

Q Is it your judgment that DDT has increased -- the use of DDT has caused an increase in the bird population in the U. S.?

A No.

Q You were familiar with the -- may I use the word "raging controversy" between the pro-DDT people and the anti-DDT people from 1960 to 1970? Were you familiar with that controversy?

MR. ROTHWELL: Objection, your Honor.

THE COURT: Sustained.

Q Were you familiar with that controversy as it pertained to the number of birds in this country?

A Yes.

Q And which side of the controversy were you on, sir?

A My evidence would indicate that birds have numbers, populations have increased during the time that DDT was used the greatest.

Q So your opinion was that DDT had no deleterious effect on the bird population in the U. S. from, let's say, 1960 through 1972?

MR. ROTHWELL: Objection to this line.

THE COURT: Sustained.

Q Have you ever heard of the Blue List, sir? The Blue List; do you know what that is?

A I have heard of it. I don't know what it is.

Q Could you describe it or explain it for his Honor and the members of the jury?

THE COURT: He said, "I don't know what it is."

Q Sorry. You don't know what it is at all, sir. You heard of it but that's all?

A Correct.

Q Forgive me. I didn't hear the answer. Thank you.

MR. AGOGLIA: Thank you, sir.

MR. ABRAMS: I have no questions, your Honor.

THE COURT: You may step down.

(Witness excused)

THE COURT: Next witness?

MR. ROTHWELL: Plaintiffs rest, your Honor.

THE COURT: Plaintiffs rest.

The jury is excused for a little while.

(The jury left the courtroom.)

THE COURT: We will hear from Mr. Agoglia first.

MR. AGOGLIA: Your Honor, would you give time enough to give Mr. Trowbridge time to handle all motions?

THE COURT: Yes.

MR. TROWBRIDGE: Your Honor, defendant National Audubon Society, Inc., and individual defendants respectfully move the Court for a directed verdict upon the grounds that as against those defendants, the plaintiffs have failed to make a prima facie case in several important respects.

First, the plaintiffs have failed, we submit, to adduce not only the clear and convincing evidence of actual malice which we submit that the law requires they do, in a situation involving exchanges of opinion and discussion of public issues by people who have thrust themselves into such public controversy, and that we suggest that there isn't any evidence at all from which any inference of actual malice, in the sense it has been defined by the spec, can be found to have motivated, I should call them, the Audubon defendants.

We have in the Amant case the Supreme Court holding that in order for there to be full malice, there must not only be a reckless disregard of the truth by the person making the allegedly inflammatory utterance but that person has to have entertained serious doubts as to the truthfulness of what he was saying.

Now, what we have here is an ominous foreward in American Birds Magazine written by Mr. Arbib which discusses certain unnamed persons whose views with respect to the significance of bird counts as a population indicator differ very materially from those of Audubon and they say in substance, and I am paraphrasing, the mark appears when you are in the presence of such a person or a person who says the opposite, you are in the presence of someone who is being paid to lie, or just parroting that which he knows nothing about.

There is no evidence in our case that Mr. Arbib had any specific individual in mind as to either of these two disjunctive categories, paid to lie or parroting that which he knows nothing about.

Further, there is no evidence at all that Mr. Arbib harbored any ill-will or any feeling toward these plaintiffs when he wrote the foreward to the American Birds.

Further, the only evidence that would connect any of the Audubon defendants to the New York Times article of August 14, 1972, is the testimony of Mr. Devlin. And that testimony only goes so far as to have Mr. Arbib reluctantly provide to Mr. Devlin the names of these five scientists as those referred to in the foreward to the American Birds, and as I say, the foreward itself contains alternative conclusions and is really put in a hypothetical fashion, so that a fair reading of the article as it is, the foreward to the American Birds Magazine, would be that this is not maliciousness, this is an attempt to warn our counters as to how our counts are being misused.

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So we say that and take the third letter by Mr. Clement. That says, "Nor do we like to call people liars." And there is no evidence here as to any motivation on the part of Mr. Clement, except some vague statements by the witness this morning that there were meetings. I don't believe he even said Mr. Clement said these things, during the course of which the idea of impeaching the scientific statements, particularly of Dr. Jukes, was discussed. And there was testimony from Mr. Yannacone about the policy of getting ahold of the writings of the scientists with whom EDF had a controversy and preparing to face them and cross-examine them under oath in the course of the judicial administrative proceedings.

This, we submit can scarcely be regarded as any kind of evidence of malice, certainly, not clear and convincing evidence. It is entirely proper to attempt truthfully to discredit persons with whom you disagree ardently and avidly, and general disagreement on the part of anyone, or even a hostile feeling, does not actual malice make.

In addition to the absence of clear and convincing or any proof of actual malice, we suggest there is no proof that the Audubon Society or the individual Audubon defendants at any time called these people paid liars.

The evidence is that we said that some unnamed people were either being paid to lie or did not know what they were talking about, in substance, that what we told The New York Times reporter we told reluctantly, and we suggested it has not been established that there was any libel or any utterance by Audubon or the individual Audubon defendants that these people were liars or paid liars.

Quite the contrary. The evidence also indicates very clearly that there is a substantial area of independent intervening action on the part of The New York Times reporter which in no way impugns to Mr. Arbib or the Audubon Society or anybody at Audubon. The headline states "Pesticide Spokesman Accused of Lying on Higher Bird Count." That did not come from us. The first sentence of the article, I should say, in that headline, and in the first sentence there is the word "lying," I will read the first sentence:

"'Segments of the pesitcide industry and certain "scientist-spokesmen" are accused in the current issue of American Birds of 'lying' by saying that bird life in North American is thriving despite the use of DDT."

Well, there is no word "lying" in the foreward to the American Bird magazine.

We also have the evidence that Mr. Devlin checked with at least two of the plaintiffs and one of the other scientists named. We have the discrepancies between the article that appeared in the newspaper and the foreward in the American Bird, and they each speak for themselves, and we say as a matter of law that the jury cannot find that either The National Audubon Society or Mr. Arbib were responsible in any way for the article in The Times. We say in substance, your Honor, there is no proof of actual malice, no proof of libel, or, at least, libel per se -- I know you ruled on that already -- against the Audubon defendants, and there is certainly no proof in this case for any damages, pecuniary damages resulting from what happened in these publications.

That constitutes our statement of our grounds.

THE COURT: Before I ask Mr. Rothwell to reply, I should point out that I don't think it makes any difference whether you reluctantly told the names or not. I am not impressed by the fact that you reluctantly told the names. Secondly, in your summation of Mr. Yannacone's testimony you left out the testimony by him to smear in the newspapers; you spoke merely about the project to get the scientists on the stand and by cross-examining bring out testimony that might be contrary to their statements to the public.

Thirdly, when you say that the word "lying" appears in The New York Times article and that word does not appear in the article of the Audubon Society, there does appear in the article by the Audubon Society "paid to lie." And, lastly, I note on pecuniary damages he does not have to prove the New York law. They are presumed as far as reputation is concerned. He does not have to prove his compensatory damages in the area of injury to reputation.

Now, Mr. Rothwell, there are many things more you have to answer. I just answered a few.

MR. TROWBRIDGE: My recollection of the record may be faulty. I didn't understand Mr. Yannacone to use the word "smear" as to anyone at Audubon.

THE COURT: He said Clement was present when they talked of smearing these people in the newspapers. That is his testimony. First he said they talked, but thereafter he says going backwards in time he recalls Clement being present when they talked about Dr. Jukes.

B2 MR. ROTHWELL: Your Honor, I don't think a protracted statement would be appropriate on this motion.

THE COURT: You don't need a protracted statement, but you'd better come up with something on clear and convincing proof on the issue of malice and the lack of mention of names in the Foreward.

MR. ROTHWELL: Your Honor, our analysis would really start at the other end, that is, the publication by The New York Times. I think that publication with the headline "Pesticide Spokesman Accused of 'Lying' On Higher Bird Count" is libelous per se, and I believe the Court has so ruled. We asked and we have inquired as to how this came to be, and we find in the course of things that The National Audubon Society and at least two of the three individuals named in the pleadings here were involved.

Now, I suggest that the situation with reference to the Arbib-Devlin phone calls is precisely the same as if Mr. Arbib had put a footnote on that article and said the people they were talking about are these named individuals.

THE COURT: That is not the basis for a determination. If the reader picks up the Foreward article and reads it, does he know that article is written about these plaintiffs?

MR. ROTHWELL: That Foreward article as originally published was not libelous. We have not made the claim that it was, because it didn't identify anyone.

THE COURT: When I framed the issues on Thursday I framed the issues as involving a claim of libel with regard to the Foreward article. If I understand from you the article is not, then I will not charge the jury that that article appearing in the 1972 issue of American Bird is a subject for their special consideration.

MR. ROTHWELL: Your Honor, may I respond specifically to that. It is our position that the particular Foreward article that John Devlin read that day in July, when that was supplemented by Arbib giving him the names, at that moment that copy of that publication became libelous.

THE COURT: The public did not know it at that time. As I understand it, you have to be able to read the article, and from reading the article know that the article applied to the plaintiffs. The mere fact that Arbib told Devlin in a telephone call that these were the people he was referring to does not make that libelous in the eyes of the readers of The Audubon Society. You've got a much better argument if you want to argue to me that the publication in The Times gave life to the Foreward article, and I have not found a case on that yet. That is what I have been looking for for six days. I know the case where the article comes out and the same periodical, a newspaper, repeats it two weeks later, the Courts have held, and the Supreme Court of Queens County, affirmed by the Appellate Division, that the publication in the second article gave life to the first article.

But, I have not found where the publication in a different publication gives life.

MR. ROTHWELL: Your Honor, we would argue that the publication and the telephone conversation from Arbib to Devlin of the names did precisely that; it converted at least that one copy into a living, breathing, living per se exhibit.

THE COURT: I will not accept that. You can do a little homework; maybe you can find the case I am looking for. I can't find it.

Go ahead. That takes care of the Foreward. I will reserve on the motion to dismiss the claim of libel based on the article in the Foreward. I want to do a little more research. I have not found it yet. If I don't find it, I am going to strike it.

Now, what about malice? He claims that you have not at the end of the plaintiffs' case, given the benefit of all the inferences that you are entitled to, come up with clear and convincing proof, or proof which a jury can find to be clear and convincing that The Audubon Society, Dr. Clement and Mr. Arbib, were guilty of libel.

I am dismissing the case against Stahr. You meant to ask for that?

MR. TROWBRIDGE: I guess we did, your Honor.

THE COURT: Have you produced enough evidence from which the jury can find by clear and convincing proof that the defendant Audubon Society, Clement, or Arbib were guilty of actual malice, which is knowledge that the statement is false, or is in reckless disregard of the truth or falsity of the statement? What evidence do you have which would keep these defendants in this lawsuit?

MR. ROTHWELL: The Yannacone testimony, which I think is also attributable to Clement, the vice-president of The Audubon Society, who was present at those meetings when this was discussed, and it would be proper to draw an inference that the motivation to discredit by the means that were discussed was carried over into this publication by John Devlin, of The New York Times, and then ratified by Exhibit 3, the endorsement of what had occurred in that August 14 letter from Clement to The New York Times. I think that is very powerful evidence as to what the intent in terms of actual malice is.

B3 Now, from the other evidence in the case, and, concededly, Mr. Arbib has not testified, and the evidence, of course, is only in deposition form, but in the earlier proceedings it was noted that Mr. Arbib -- and counsel raised it on his motion -- didn't know who or what he was talking about. He proceeds to broadcast charges of this gravity without having any information about the basis thereof. And then after he is called, he goes to Clement and says, "Gee, what are we talking about?" Or words that effect. And all of this, we think, fits into the second part, the second branch of The New York Times vs. Sullivan rule, reckless disregard of whether the matters are true or not. So I think we have produced evidence under both branches of New York Times against Sullivan, that is, as to actual malice, and the other would be testimony from Mr. John Devlin and so forth in reference to reckless disregard as to whether the statements are true or not.

We think, for the purpose of this motion, your Honor, that this evidence would suffice. We are hopeful thereof.

THE COURT: Mr. Abrams? You are concerned only with the second alleged libel.

MR. ABRAMS: Yes, your Honor. The New York Times moves for a directed verdict on the ground there is no proof whatever, not to say any clear and convincing proof, of actual malice on the part of The Times, or of its reporter.

The law has been set forth already here, and I will turn to each branch of it.

First, is there any proof that Mr. Devlin of The Times knowingly printed something which was false, that is to say, that its article contained material as the ruling which your Honor made on the summary judgment motion, anythin that could be or might be brought out on trial which would allow the jury properly to find that The Times reporter was lying?

The Times reporter testified. That is the only testimony. I submit that there is no evidence whatever, not to say any clear and convincing evidence, that Mr. Devlin did not accurately report precisely what he was told, or, at the very least, something close enough to what he was told, and that there is no evidence of actual malice.

In the second branch, whether there is any proof of any reckless disregard of the truth, which your Honor's decision on the summary judgment motion adverted to, by quoting the leading authorities on the point, required proof of serious personal damage, that Mr. Devlin harbored thoughts that he was not accurately reporting what he was told. He has testified that he did not do so. There has been no contrary testimony. All the testimony has been entirely supportive of what Mr. Devlin said. The testimony of plaintiffs has been that Mr. Devlin called them, that Mr. Devlin read them the Foreward, that Mr. Devlin gave them an accurate statement of what the Foreward said, and he told them precisely what Mr. Devlin said on the stand he had been told by Mr. Arbib, which is that these were the people who had been referred to in the article itself. So I submit on that basis, your Honor, and without more, that The Times is entitled at this point in this case to a directed verdict.

The distinction which counsel has made as to lying and patently lying has no merit at all. There is simply no evidence, no evidence at all upon which a decision can be made at this time against The Times.

THE COURT: Mr. Rothwell?

MR. ROTHWELL: Your Honor, our case against The Times under The New York Times against Sullivan rule, depends squarely upon the second branch, that is, a reckless disregard as to whether the matter was true or not.

It also depends upon the headline and upon something that was added in the alternative, or, rather, stated in the alternative, either the man is being paid to lie or he does not know what he is talking about. That Mr. Devlin had before him in The Audubon Foreward, and they took that and they put it in the headline, the word "lying." And they put the names in the article.

All the testimony is not yet in. We know that Mr. Arbib is going to testify, and he will testify that "When I gave those names to Mr. Devlin I told him and warned we were not calling these people liars." It is a very curiou statement, but it will be argued later. It is not in the record now.

What is Devlin's testimony and what is the testimony of plaintiffs' in reference to their talks with him. Well, we have a very peculiar situation, where in the article itself Devlin mentions Dr. Spencer, and Spencer said the thing was almost libelous. Well, of course, I don't know that Dr. Spencer is a lawyer. I think he is a scientist And so I don't place any great reliance on his "almost libelous." He could have used any other words, but that can certainly be read as not only a strong objection to Devlin, but almost a warning to Devlin. It implies very, very clearly in the article itself that the material that Devlin was reading, which was the Audubon Foreward, was simply not true. We got that from Dr. Spencer in terms of "almost libelous."

Then we go to Dr. White-Stevens. According to Dr. White-Stevens' testimony, there were other warnings, that it was scurrilous, unfounded, emotional, hysterical, was not true, and according to Dr. White-Stevens' testimony in that 45-minute conversation, Devlin said to him, "Well, do you think I ought to publish it?" And White-Stevens said, "Of course, I am not someone to tell The New York Times what to publish. There is a freedom of speech sort of thing involved here. But, also, don't forget there are libel laws, too."

That is what Dr. White-Stevens testified to.

B4 Dr. Juke, the other plaintiff who testified, not only affirmed that he told Devlin that the article, the American Bird Foreward article, was absolutely untrue, unequivocally untrue as it applied to him, but, your Honor, on August 7, the Monday that was a week before the publication of the article, Devlin had already talked to White-Stevens on the 4th -- we don't know when he talked to Spencer· on the 7th he talked to Dr. Juke, and then both these people made more or less haste to send to Devlin material that would tend to prove their position on this matter, or would contain their statements as to what they believed the truth to be, that they were not lying about anything, and Devlin, with all of this material before him, with all of these storm signals up, he was simply not interested in whether the charges were true or not, and hearing him on the stand, he had no concern; he had the word "libel" thrown at him at least twice, possibly three times.

Everywhere he turned, everybody he talked to said, "This is not true. How does this Foreward article apply to me?" And, under those circumstances, plus the headline, I think we have sustained our burden of proof, your Honor, under the second branch of New York Times against Sullivan.

THE COURT: I have to admit I am a little confused by the wording in St. Amant and the wording in Goldwater. I think Goldwater in the Second Circuit has diluted what seems to be said in St. Amant. That wording is that if the writer has serious doubts, the burden is on the plaintiff to show that the writer has serious doubts.

It seems to me that is a little difficult to prove in that fashion. Judge Waterman said in Goldwater, the only way you can really prove it is by being able to show that Devlin admitted that he had serious doubts. In Goldwater the Court sustained a charge to the jury that the jury could take into consideration all of the evidence from which it might infer that he had serious doubts. With that analysis you get into the reasonable man's theory, and the Court has left us a little confused at this point as to how we approach it. I think the only way to approach is is the way it was done in Goldwater, because if Devlin takes the stand and says, "I had no serious doubts," under Amant, that would end the litigation.

However, it is the kernel of our adversary system to produce evidence attacking the credibility of that witness. And the jury is entitled to say, "We do not believe he had no serious doubts." And the only way they can do that is to see the evidence adduced at trial. I am going to reserve decision on both motions to dismiss.

We will have a five-minute recess to start your defense.

MR. TROWBRIDGE: May I make one additonal point that I forgot?

If the testimony of Mr. Yannacone is treated as some kind of evidence of actual malice on the part of Mr. Clement or anybody at Audubon, it can only go to Dr. Jukes, because he said nothing of any conversations about others.

THE COURT: Edwards was one of the names involved

MR. TROWBRIDGE: I didn't know about Edwards.

THE COURT: Edwards is not included, but you can argue to the jury

MR. ABRAMS: I would like to make two points for the record: First, nothing in Goldwater changes the requirement of clear and convincing proof.

THE COURT: I am not saying it does.

MR. ABRAMS: Second, Mr. Arbib has not yet testified. The plaintiffs chose not to call him; they chose to call The Times reporter as a witness. I would simply urge on the Court in its consideration of the motion that there is nothing at all in the record which would permit an inference even that Mr. Devlin had any doubts at all that

Audubon was saying what he said they were saying. There are two very separate levels here.

The first question is what he was told. Is there any reason at this point on this record to have any doubts at all that Mr. Devlin was told what he told the jury he was told, which is these are the people referred to in the article?

THE COURT: What bothers me, Mr. Abrams, is the next step. Here is a reporter for The New York Times of 25 years, who is publishing an article calling five reputable scientists liars. One of the scientists, who does not happen to be a plaintiff here, is a Nobel laureate. Now, maybe under the Supreme Court cases he could have published that withtout doing any investigation at all. It may be that under St. Amant there is no duty to investigate, that you have a responsible source, to wit, The Audubon Society, you can publish it.

But, Mr. Devlin is a careful reporter, it seems, and he calls up, he tries to get thse five people before he publishes his article. He reaches three of them, two of whom are plaintiffs in the case. All three of them tell him it is libelous, it is untrue, "We are sending you material which you should read to show it is untrue."

Devlin is not even quite sure whether he read it or not. But what he does have on his telephone notes is "libelous. Wow." Now, it seems to me that if a newspaper reporter sees libelous, would he go ahead without doing anything more and publish it, not even going to the attorney for The Times, maybe not you personally, Mr. Abrams, but somebody on the staff and say, "Look, I am going to accuse five guys of being liars: One is a Nobel laureate. Do you think I ought to do more than just take their word on the telephone?" I think that is sufficient if the jury believe to find clear and convincing proof of reckeless disregard.

B5 MR. ABRAMS: I just want to press the distinction as to the first and second levels. I think we agreed there is no proof as the record stands that Devlin was not told what he said he was told.

Then the question becomes one of law, whether that being so, Devlin being told here people are liars, he calls up those people and he gets information saying it is, in effect, hysterical, emotional, it is almost libelous, it is unfounded.

THE COURT: Yes, but he was told more than that, according to the witnesses on the stand, and I have to go by what the witnesses on the stand told him.

MR. ABRAMS: My argument to you is that which he published is what The Audubon Society told him, and The New York Times can rely upon that, not for the truth, but for being a source, and we are allowed to say The Audubon Society said today these people are liars, and The Times can't be held to go out and do any investigation.

THE COURT: I think you might have been in a better positon if Devlin just published it and walked away, but he undertook to investigate, and he is calling a Nobel laureate a liar, and there are statements reflected in his notes "libelous. Wow." He does not even communicate with the lawyers for The New York Times and tell them, "We are going to have a two-column headline calling five prominent scientists, one a Nobel laureate, a liar. Do you think I ought to go look into this more or should I just go ahead and publish?"

I think the jury, on that, can determine whether there is clear and convincing proof of reckless disregard. They don't have to.

(Recess)

(Continued on next page.)

THE COURT: You may proceed.

ROBERT S. ARBIB, called as a witness by Defendant Audubon, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. AGOGLIA:

Q Mr. Arbib, what is your present occupation?

A I am an editor and a writer.

Q And for how long have you been connection with the Audubon Society?

A I believe I joined the Audubon Society on December 1st of 1970.

Q Would you tell us a bit about your educational background?

A I went to -- I lived on Long Island as a boy and went to school there. I went to Yale University where I was awarded a Bachelor of Science Degree in biology. That is really the extent of my formal education.

Q Would you tell me, sir, upon leaving school, what was your business or professional occupation?

A Well, it was the depth of the Depression and I had decided before I graduated from Yale that I would not pursue as a profession the biology because it would have required three or four more years of schooling, which I could not at that time afford, and I had been told by some of my teachers at the University that I ought to get into the field of writing.

I had written for various college publications, and so I tried to get into the business of writing in one way or another, and as I said, it was the depth of the Depression, and I finally did find a job with a small radio station in Brooklyn at the princely salary of $3 a week.

I went from there firectly to an advertising agency in New York City where I worked for some time in the mailroom as one of the juniors that were being trained for advertising.

I graduated from the mailroom the day that an article, a feature article of mine, on birds, appeared in the Sunday Magazine Section of the New York Times.

There were some executives at a conference. I was serving this lunch and I was introduced to this group of clients and one of them said he was familiar with my name and he had seen some writing of mine recently, and when it came out that I had had an article published in the Times, I was immediately transferred into the Copy Department, which --

Q I'm sorry. How long did you stay in that field, sir, in the advertising field?

A Well, I was in advertising with five years out for service in the Army until 1968, in various capacities.

Q Did you do any writing other than within your activity in advertising during that period of time, that is, from the time you left the service until 1968?

A I should say that in the service I had a different type of experience with writing. I was for two and a half years an Army engineer building airfields in England, and for the last two and a half years, I was with Army public relations.

I was writing magazine articles and newspaper articles. I was helping the general staff and others prepare for briefings. I wrote sections and fragments of speeches by the general staff from General Eisenhower down.

I would lead sorties into the field up to the front by prominent visiting either journalists or politicians or statesmen.

THE COURT: What is the difference between politicians and statesmen?

Forget it.

(Laughter)

THE WITNESS: I agree. It is a moot point.

A (Continuing) During the time I was in Europe, I was writing a column -- the last year I was in England, I was writing a column for the Daily Express Newspaper in

London, which was to -- the purpose of which was to interpret the American -- the strange American invader of England to the English people. We had quite different ways, and we were cluttering up their highways and drinking their beer and dating their girls, and this was an attempt to more or less explain our behavior.

Out of this came a book. That was what I was getting to.

Q As a result of your experiences there, you did publish a book, did you not?

A Yes.

Q Now, let's get to the advertising.

What type work did you do in the advertising field? Just give us a quick summary of your work.

A I started as a copywriter and went on to be a copy supervisor, and then an associate creative director. I was sent by my firm to California to be in charge of all the creative activity in the two West Coast offices in Los Angeles, and San Francisco.

Over the course of my career, I worked on a number of very important large accounts. During this time, I had a number of people working for me, both writers, artists, division production people, and all the people that would create advertising in one form or another.

Q Are you a member of any societies, scientific societies dealing with birds?

A Yes, I am.

Q And what is the leading society in this country in the field of ornithology?

A Well, the leading professional society is called the American Ornithologists Union, and this is composed of almost all the professional ornithologists and, of course, many amateurs, too. It has three categories of membership. Anyone can join just by paying their dues and subscribe to the journal .

Then there is a class called elective member, which is limited to 200 of the people considered to have contributed most to ornithology, and then there is a third category of fellow, which usually goes to older members who have consistently contributed over many years.

Q Now, have you consistently contributed over many years?

A Well, I was elected to the elective group in 1955. This, I believe, is limited to 200.

Q And tell us what your activities were in the field of ornithology from the time you were -- well, from the time you finished your service up to the present time.

A Well, I was really an active amateur. I wrote a column for a newspaper on Long Island about birds. I wrote scientific articles for publications in various journals.

I was a member and elected president of the Linnean Society of New York, which is the oldest ornithological society, the second oldest in the U. S. It is now in its 98th year. I am now a fellow of that society and a member of the council.

I was elected president of an organization called the Federation of New York State Bird Clubs, which consists of about 40 clubs around the state with about eight or nine thousand members. I am now the chairman of their Committee on Publication and Research.

I have written -- I have delivered scientific papers at meetings of the AOU, and also at international meetings. I delivered a paper at the International Ornithological Congress, which is a world body, at The Hague in Holland in 1970, and at Canberra in Australia in 1974.

I have spoken before many groups around the Eastern part of the U. S. from Michigan to Alabama.

Q Have you been in environmental affairs locally? In other words, where do you live at the present time?

A Westchester County.

Q Have you been active in Westchester County in environmental affairs?

A Yes, I have. I am supposed to be at a hearing this afternoon in Rye, New York, which concerns degradation of the environment of Playland Park.

Q Sir, have you ever heard of the Blue List?

A Well, the Blue List is a list that I invented four or five years ago. I should say that the Government, American Government, in fact, the world body, have lists of endangered species, species which are endangered with extinction, such as birds as the California condor and the whooping crane and the Eskimo curlew, and so forth.

They have published yearly lists of the birds that are really endangered and in very great danger of extinction.

It seemed to me at that time that we ought to have a second list of birds that were declining in number but were not yet really in danger of extinction, mainly for the point of alerting the bird-watchers and other students to look for these birds and report on them.

I should say, in my role as Editor of American Birds, I am in contact with hundreds, if not thousands, of birders from coast-to-coast, including Canada, and the U. S. and Central America.

So I thought the best way to go about publishing this Blue List would be to poll these people and find out what birds they felt were declining, to such an extent that we really ought to publish this early warning list and put them on it.

I heard from my 25 regional editors and they, in turn, had questioned hundreds of their observers, and we published the first list. It had 49 species on it.

Since then, the list has grown to fifty-five. We have taken a few species off. We have added some. We also have about another 60 species which have been nominated by some people but we don't think by enough people to formally put the bird on the list.

The Government, the people in the Interior Department, Fish and Wild Life, Endangered Species Office, were very interested in this list and they decided to adopt it themselves.

THE COURT: Wait. You have defined Blue List sufficiently.

MR. AGOGLIA: May I just establish that it is a recognized list today, federally recognized list today?

THE COURT: I have been waiting for him to get there.

MR. AGOGLIA: I didn't want to interrupt.

THE COURT: He is running off and running off.

Q Sir, would you tell us what the status is of the

Blue List today?

A We still publish the Blue List. The Office of Endangered Species calls it the List of Threatened Birds and they publish pretty much the same list.

Q And you were the originator of that list?

A I believe so.

Q Sir, when precisely did you become connected with the Audubon Society, more particularly as the Editor of American Birds?

A I had written for this same publication back in 1941 for a few months, and I had been --

Q Forget that. Of recent vintage, if you would.

A As I said, December 1, 1970, was the day I started work as editor.

Q And what did your duties include -- now be very brief, if you would -- as editor of the magazine?

A Soliciting articles, editing material that came in; in other words, correcting it for everything, grammar, punctuation, meaning, doing the proofreading, getting pictures, illustrations, writing captions; it was almost a one-man operation.

Q And were you connected, sir, with the Christmas Bird Count Feature of American Birds?

A Yes.

Q And for how long had you been connected with that aspect of it?

A As a participant, I took my first Christmas Bird Count in 1930 on Long Island. And that count, Southern Nassau County is still in existence today.

As editor, I had come in as a part time consultant to the Christmas Bird Count of the previous year, 1969. It was published in 1970.

MR. AGOGLIA: May I have the exhibit with the foreward,please. The original.

(Document handed to counsel.)

Q Sir, I show you Exhibit 2 and ask you if this is the foreward which you published for the April edition of American Birds in 1972.

A Yes, it is.

Q Could you tell us the source of your information that is contained in the foreward?

A In the foreward?

Q Yes.

A Most of the foreward was information that I knew because it is a kind of summary of what follows in the pages. I should point out that in addition to being --

THE COURT: That is not what you are being asked.

THE WITNESS: Excuse me.

Q Could you tell us, sir, the purpose for writing the foreward at the time you wrote it?

A It is just an informal word from the editor to the reader about what he is going to find in the magazine.

Q Okay. Now, you wrote in this magazine, sir, concerning the bird count, Christmas Bird Count figures and statistics, did you not, sir?

A Yes, I did.

Q And you wrote also about their interpretation by various scientists who were using the Christmas Bird Count to show that DDT had no deleterious effect on bird life or wild life in this country, isn't that so?

A Yes.

Q You wrote a paragraph beginning, "The apparent increase in numbers of species and individuals on the Christmas Bird Counts have, in most cases, nothing to do with real population dynamics."

Would you tell us, sir, what that means and the significance of that, if any?

A Well, the Christmas Bird Count is a supporting event more than anything. It was recently a subject of another article in the Times called, "The Super Bowl of Birding," and it is the culmination of the birding year. It is a big social event; usually has dinners and parties associated with it.

There are so many variables that have to do with the counting of the birds. I made a list of the 23 different factors, all of which have important bearing on just how many birds are seen by any particular group; that you cannot pick out one or two factors or one or two birds and say the Christmas count proves this or that, that they are decreasing or increasing.

The Christmas count is mainly useful to tell you where the birds are. If we see counts all over the Eastern part of the U. S. and everyone shows they are seeing cardinals, we can make a map showing where the cardinals are in winter.

But from year-to-year or from over a ten or twenty-year span,you cannot say Christmas counts are proving that this species or that species is decreasing or increasing.

Q You said here, "They are the result of ever increasing numbers of birders in the field."

Would you tell us, sir, if you know, statistically, whether there was, in fact, an increase in the number of birders in the field? Let's take from 1940 to 1960.

A I do know specifically that there was an increase between that period, because there has been a constant increase almost every year.

Q Would you have an opinion, based upon a reasonable degree of scientific certainty, as to whether or not anyone could give an opinion concerning the increase in number of a specific species of birds from observations made at or about a courthouse in some town in Kansas or in a specific locale such as that?

A Well, of course, it would be impossible to judge whether robins were increasing or decreasing on a continental basis from looking at them in one hackberry tree in a little place in Nebraska.

Obviously, that hackberry tree must have grown over the years and, therefore, had more berries on it and it might attract more robins. There are other factors: The climate of those particular winters, whether other people were planting more berry fruit shrubs which has been going on in the last twenty or thirty years.

I could -- I know you want me to be brief, so I won't list all the factors that might be involved.

Q In your opinion, based upon a reasonable degree of scientific certainty, could a scientist draw a reasonable conclusion from such an observation, as I have described to you, or as you heard the witness, Mr. Marvin, describe today?

A I would discount any such observation as giving a clue to any continental trade in population.

Q Could you tell us, his Honor, and members of the jury approximately what area of the U. S. is covered in the annual bird count, percentage-wise?

A I once figured it was about 1.2 percent of the area of the U. S. But even that is misleading because bird counts are selected. The areas that are selected are selected for places where people will find the most birds. And if you want to take a bird count in Suffolk County, Long Island, you put that 15 mile circle in a place where you are going to see the most kinds of birds, and this, I think, is general throughout the U. S., so you are not really getting a continental picture.

Q Sir, you said here that the results of ever increasing numbers of birders are the results of increasing numbers, better access -- what did you mean by that, sir?

A Well, obviously, in the last 30 years, particularly, 35 years, we have enormous programs of road building throughout the U. S., people have access to places where they could not get before, except on foot.

Now, they can go by -- the snowmobile, for example, has opened up vast areas where the birder could not get in the past; just the roads. People are now taking the Christmas Bird Counts by helicopter, by airboat, by motorboat, by snowmobile, all kinds of vehicles which probably were not -- I am certain were not in existence in 1940.

Q You said here another factor was better knowledge of where to find the birds.

What did you mean by that, sir?

A Well, you take our Southern Nassau County, that I went on first as a boy. We hardly knew the area. We did not know where to look for the birds. Now -- and we had eleven boys and their teacher went out in one car and several bicycles.

Now we have got 60 people out in the same area, everybody knows exactly where to go, where the chances are best to find the birds, we have many more refuges now than we had then, and, obviously, we are going to see many more birds than we saw in 1930.

Q You also said something about increasing sophistication in identification.

Could you help us out there, please?

A Well, in the old days, the only way a bird was positively identified was by shooting it. That gradually went out with the arrival of the binocular and, however, the various books that told people how to identify birds really started in the late Thirties, and became ever increasingly more popular and more sophisticated in the Forties and the Fifties and Sixties.

We now have, which we did not have in those days, recordings where people could learn what the birds sounded like. So when they went out in the field, they could identify them. They were not in existence in 1940.

THE COURT: When did they come into existence?

THE WITNESS: My best recollection of that would be in the late Forties or the early Fifties, the first recordings.

Q You were familiar, were you not, with the controversy of DDT vis-a-vis bird counts and other matters or related matters,as it existed in the 1960's and early 1970's,up until the time of the publication of this article?

A No, I wasn't really aware of the controversy. I was a reader mainly of ornithological journals and the other side of the argument did not appear there.

I was aware that many articles or papers were being published about the harmful effects of DDT. I did not really -- I was not aware that there was scientific against this.

Q There came a time, in any event, when you published a foreward to the American Bird Magazine in April of 1972, isn't that so?

A Yes.

Q And in that, you said, "We are well aware that segments of the pesticide industry and certain paid scientist spokesmen are citing American bird count totals as proving that bird life in North America is thriving."

Do you remember that statement?

A Yes, I do.

Q What was the source of that statement, sir?

A I am not quite certain. I don't believe I could name any one individual. But someone or people came to me at about the time I had written this foreward and said to me -- this is paraphrasing, of course -- "Hey, do you realize that those statistics of yours, those bird counts of yours, are being used by people to prove that DDT is not harmful, that there are more birds now than there ever were?"

And I said, "No, gentlemen. That sounds bad."

They said, "Well, you ought to write a warning to people to discount this, because,obviously, DDT is harmful," and I believe that there was at that time hearings, federal hearings that led to the ban of its use in the U.S. And I was a bit incensed that our material was being used this way. So I wrote these four paragraphs.

Q Can I ask you this, sir:

Do you have an opinion based upon a reasonable degree of scientific certainty as to whether or not you can draw any legitimate scientific conclusion from the bird count studies published at that time and previous thereto from the year 1940 through 1970?

Just yes or not. Do you have an opinion first, sir? Could you do that for us?

A Yes, I have an opinion.

Q Would you be good enough to tell his Honor and the members of the jury what your opinion is?

A My opinion is that you cannot just take one factor or two factors, such as birds per person or birds per hour and determine with anything but the wildest of guesses whether the population has increased or decreased.

Q And, therefore, sir, may I ask you further, then, if someone used the bird count statistics to draw some kind of an alleged scientific conclusion, do you have an opinion based upon a reasonable degree of scientific certainty as to whether or not that conclusion had any worth?

A I would say it had little or no worth.

Q And would you just give us a brief explanation of your answer, sir?

A Well, as I have tried to point out, there are so many variables that have to do with bird populations as taken from the Christmas Bird Counts, that basing your results on any one or two is highly fallacious. I don't think it is accepted by any branch of the ornithological world.

You are coming up with the rankest of conclusions from the shakiest of evidence.

Q There came a time, sir, when, in fact, the foreward and the book itself, which was before you, was published, isn't that so?

A Yes, that's correct.

MR. AGOGLIA: If I may lead here briefly, your Honor.

Q Thereafter, did you receive a call from a representative of the New York Times?

A Yes.

Q And did he identify himself as Mr. Devlin?

A Yes.

Q Would you tell us approximately when that call was received by you?

A I believe it was sometime in late July.

Q And would you tell his Honor and the members of the jury, the substance -- was it a telephone call, sir?

A Yes, it was a phone call.

Q Did you ever have a face-to-face meeting, or was it all done on the telephone?

A All telephone.

Q Would you tell his Honor and the members of the jury, the substance of the first telephone conversation with Mr. Devlin?

A Well, he introduced himself and we were on a first-name basis because we had known each other for a number of years, and he said, "This is Jack Devlin. I have just read the foreward in your April issue and it is very interesting, and I am particularly interested in this sentence that accuses some people of being paid liars or parroting something they know nothing about. I think there is a story in it."

And I said, "Well, I don't" -- I don't actually remember what my response to that was. But what he eventually said was he wanted the names of the people I was citing as paid liars.

And I said, "Jack, this is a generalized warning, I am telling people to look out for something, and if they see something like this, to understand that this might be or this is the situation, either they are being paid by somebody to put out propaganda in favor of DDT or they are talking about something they know little or nothing about."

And he persisted in asking me for the names.

And I said, "Jack, I don't know the names. I don't know. I have not read any of the papers on that side of the argument. I could not tell you a name for love or money."

I am paraphrasing what I said to him. I don't remember the exact words, but that was the meaning.

Q Okay. If I can just interrupt for a minute.

Did there come a time when you received an additional call from this Mr. Devlin?

A Yes.

Q And do you know how long that was, the interval of time between the first and the second call?

A I would say it was the next day.

Q And did you supply Mr. Devlin with certain names?

A No, I did not. I told him on that occasion that I would see if I could get some names for him. But I didn't know the names of anybody that this would apply to. I wasn't sure I could get any names. And I would try to get some names for him.

Q Could you just tell us the purpose of the statement, "Any time you hear a scientist say the opposite, you are in the presence of someone who is being paid to lie or is parroting something he knows little about"?

Would you tell us the very purpose of that statement, sir?

A Well, the purpose was to warn people to take statements, such as I was referring to, with a grain of salt, they should not believe -- necessarily believe what they saw printed.

(Continued on next page)

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Q Were you of the conviction at that time that when you had the conversation with Mr. Devlin and wrote that statement that anyone who would use a bird count to justify a scientific conclusion that DDT would be of help to the birds or have no effect on them would be arriving at a scientifically accurate fact?

A Yes.

Q What was your opinion?

A My opinion was it would not be scientifically valid and should not be believed.

Q Now, did you receive an additional call from Mr. Devlin?

A Yes.

Q At that time did you supply him with certain names?

A Yes, I did.

Q Do you recall where you got those names from?

A Well, I believe after the second call I went to see Mr. Clement, I believe, who knew the most about this subject, and I told him that Mr. Devlin was pressing me for the names, which he was, and I told him that I felt a good deal of pressure because I knew of the power and prestige of The Times, and I knew that we wanted to maintain good relations with The Times. I knew that almost all the stories that emanated from National Audubon came from or went through Mr. Devlin. So I didn't really want to cross him, and when he pushed me to get names for him, I felt I had to do something to see if I could accommodate him.

Q Did you go to Mr.Clement and receive some literature from him?

A Yes, I did. Mr. Clement --

Q Hold it now. I am going to show you this document, if I may, and ask you if that was the source material for the names which you ultimately gave to Mr. Devlin of The New York Times?

MR. ABRAMS: I will object to leading the witness in this fashion.

THE COURT: Sustained.

MR. AGOGLIA: I will withdraw it.

Q Could you tell us the source material you used to obtain the names?

A Yes. Mr. Clement said, "Well, the whole story is here in a manuscript I have written for publication called 'Environmental Affairs,'" and he asked his secretary to get a carbon copy from the files, and he handed it to me. He said, "Read this. This will tell you who the people are and what they have done."

Q I am going to show you this document which I am advised was heretofore marked Audubon's Exhibit D and ask you if this is a copy of this document that you have referred to that Mr. Clement gave you?

A I believe it is, but I didn't see it in this form. I saw it in a typewritten manuscript.

Q Just looking at it, it was the exact duplicate, except for the form of it?

A Yes.

THE COURT: Wait. That is not in evidence.

MR. AGOGLIA: I know.

I ask that it be marked for identification.

xx (Defendant Audubon's Exhibit D marked for Identification.)

MR. AGOGLIA: With the Court's permission I will offer it into evidence at this time.

THE COURT: Any objection?

MR. ROTHWELL: No objection.

MR. ABRAMS: No objection.

xx (Defendant Audubon's Exhibit D received in Evidence.)

Q When you gave your name to Mr. Devlin after consulting the the booklet which we call D, will you tell us the substance of the conversation had with Mr. Devlin at that time?

A Well, he called me a third time. I was actually going to let the matter drop if he didn't call me again, because I didn't want any part of this, and I told him I did have some names for him. This is also reconstructing something that happened four years ago. I believe I said, "I want to back off this business of paid liars. All we want to say about these men is that they have consistently misconstrued or published in American Birds or its predecesso

Q And, specifically, what information did you discuss with him? What type of information?

A Well, we already knew what the subject of the discussion was. It was the misuse of the Christmas Bird Count information in bird population studies.

Q And when you had this conversation with Mr.Devlin did he say anything to you about the use of the names or the suggestion you made to him?

A I made it very clear to him that under no circumstances was he to say that we were calling Mr. Jukes a paid liar or Dr. White-Stevens a paid liar or anything like that. I said, "All we want to say is they have been misconstruing and publishing information which shows a lack of knowledge of the subject."

I don't know his response, but it was something like, "I understand," or "Okay," or "Yes," or something.

Q Did you give him locations where these men were when you gave him the names?

A Yes, I read it straight from the manuscript.

Q And that is the manuscript Exhibit D?

A Yes, sir.

Q Did he tell you when you spoke to him at any subsequent time that he had conferred with any of these men? Just yes or no, please.

A No.

Q In other words, after you gave the names and their locations, did he ever call you back?

A No, he didn't.

Q And so it is clear, Mr. Arbib, the conversation with Devlin and the giving of the names dealt strictly with the misinterpretation of the bird count? Would that be an accurate and honest statement?

A I believe I made that very clear to him.

Q Had you ever heard of any of these men, the five names that you gave him, prior to that conversation with Mr. Devlin?

A Yes, I had.

Q And had you read any of their articles?

A I had heard of two of them. I heard of Dr. Borlaug in relation to his Nobel Prize; I had heard of

Mr. Jukes because I had seen one or two letters he had written to The Times or some other publication.

Q How about Dr. White-Stevens?

A No, I had not heard of him.

Q Dr. Edwards?

A No.

Q And now, Dr. Borlaug, did you ever call him a liar?

A No, I didn't.

B2 Q Did you ever call Dr. Jukes a liar?

A No.

Q Did you tell Mr. Devlin of The Times that these were people who had really misused these bird counts in arriving at scientific conclusions based upon them?

A Yes.

MR. AGOGLIA: May I have just a half a moment, your Honor?

THE COURT: Sure.

(Pause)

Q My colleague asked that I ask this question: Did you have any ill feelings, any type of animosity in any manner, shape or form concerning any of the five men whose names you gave to Mr. Devlin in that conversation?

A No, because I had just read this manuscript and was just reading him names from it.

Q Did you harbor any ill will even before that concerning any of these men?

A No.

MR.AGOGLIA: That is all I have. Thank you, sir.

MR. ABRAMS: Your Honor, if there is no objection I would like to put up copies of that which the plaintif has produced so the jury may see them.

(Pause)

CROSS-EXAMINATION

BY MR. ABRAMS:

Q Mr. Arbib, so you will know what I am doing, I am putting here the beginning of Exhibit 1, The American Bird foreward that you have in front of you, and Plaintiffs' Exhibit 3, which is the letter of The National Audubon Society to The New York Times, August 14, 1972?

A Yes.

Q Was the foreward that you wrote, Mr. Arbib, printed with all the same wording that you initially wrote it or were there any changes?

A Well, it is the final manuscript as it was written, yes.

Q Was there a first draft?

A Yes.

Q Which was different in any way than the copy as it appears here?

A It was different in that I showed those four paragraphs to Roland Clement and he suggested the phrase "or is parroting something he knows little about."

Q And before he suggested those words, they did not appear in the Foreward at all?

A No.

Q Is it correct, then, when you first wrote it, that sentence read, "Anytime you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie"?

A Yes.

Q Whom did you have in mind?

A I didn't have anybody in mind. I had heard about controversy and I had heard just insofar as conversation that people had been using our statistics wrongly, and I thought it was time warned our readers.

Q I understand your testimony. I am asking you now, is there anyone at all, any single person that you had in mind who was being paid to lie?

A No, there wasn't.

Q Was there anyone that you had in mind when you wrote this, when you used the phrase "certain paid 'scientist-spokesmen'"?

A No.

Q Did you have anyone in mind when you used the words "This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving of reasons".

A Any person?

Q Yes.

A No.

Q Will you tell the jury again where you got this information from that you wrote, that information that I just read to you? Who told you that?

A Well, it was conversation with people in the office, and as I have said, I am not sure whether it was one, two, three, four people that talked to me about this, or perhaps it was one and then I went to others.

Q Can you give us any names of anyone who said any one of these things?

A I don't recall that anyone said those exact words. I know there was a comparison brought up in the office, and I can't recall who said this. And it was a kind of off-hand remark, "Well, you know, there are reputable scientists and doctors in the employ of the American Tobacco Institute who are constantly telling Americans that cigarette smoking is not bad for you," and it is this kind of a situation.

Q Can you think of any single individual? Did Mr. Clement tell you these things?

A He may have.

Q Do you know if he did?

A Well, he gave me his manuscript to read.

Q I want you to listen to my questions very closely. Did Clement give you any names prior to the time you wrote this?

A No, absolutely not.

Q Can you think of anyone else who gave you any information which went into these paragraphs which I just read to you? Did anyone tell you specifically these people are paid liars?

A No.

Q Had anybody used the phrase, paid liars?

A I am not certain of that. It might have been, but I could not swear to that.

Q Now, at the time you wrote the material that I read to you did you have any other information, other than what you told us, to support the charges that you made in that article?

A No.

Q In the articles that you read?

A Up to that point, no.

Q You are a professional writer, are you not?

A Yes.

Q An editor?

A Yes.

Q You take seriously, do you not, the accuracy of what you write?

A Yes.

Q You take seriously and have full backup material for what you write to make sure it is correct, don't you?

A Yes.

Q Do you recall any time in your past when you wrote an article which was accusatory in nature, although not mentioning men specifically, accusing anyone of being a paid liar without having anyone in mind?

A Obviously not, no, I don't recall any such thing.

Q Did Mr. Clement tell you or suggest to you that the phrase be added "or is parroting something he knows little about"?

A We talked about the addition of that phrase and I agreed that it was something that should be done.

Q Did Mr. Clement explain to you the reason he was doing this?

A Well, it was obviously to soften the impact of the previous phrase as an alternative.

Q Did he explain to you the reason he was doing it?

A He didn't have to. I don't believe he did.

B3 Q You testified as to your first, second and third conversations with The New York Times reporter, Devlin, that you spoke to?

A Yes.

Q You said in the first conversation he asked for what information --

THE COURT: Pardon me. Would it be good to call our recess now before you start this new line?

MR. ABRAMS: I think it will be a good idea.

THE COURT: We will recess until tomorrow morning at 10:00 o'clock.

(Jury excused.)

MR. AGOGLIA: May we see you at the side bar for half a moment, please?

(At the side bar.)

MR. AGOGLIA: Your Honor asked me to be kind enough to inform these men representing the plaintiffs whether or no they need a rebuttal witness. From what I have heard there will be no need for them to have a rebuttal witness. You also asked me to inform you about my time scheduling following this witness. I have two others, and I think, your Honor, I would be relatively safe in suggesting to the Court that we will conclude by the luncheon recess if it is about 1:00 o'clock tomorrow.

THE COURT: Three hours.

I gather you are not putting in any case?

MR. ABRAMS: That is right.

THE COURT: How much time do you need for summation?

MR. ABRAMS: Twenty-five minutes.

MR. AGOGLIA: Half an hour.

MR. ROTHWELL: I will have to respond to two, fifty-five minutes.

THE COURT: Then the schedule will be we will finish the testimony by lunchtime, if we can. Summations on Tuesday afternoon and I will charge the first thing Wednesday morning.

MR. ROTHWELL: Can I ask a question of your Honor. I have not been here for a number of years. Do you have what they call the preliminary instructions to us lawyers as to what your charge will be?

THE COURT: I do not. I rule on your requests to charge before you sum up. I will rule on the requests to charge before lunch, so you will have lunchtime to think of any impact that my rulings will have on what you say.

MR. AGOGLIA: This is by way of information: Do we have an opportunity to kick it around with you a bit?

THE COURT: No. I have your requests to charge. I will rule on them.

MR. ABRAMS: Will we have a chance to get a chance to except to your charge outside of the presence of the jury?

THE COURT: Yes.

MR. AGOGLIA: When do we do that?

THE COURT: After the completion of the charge I ask you if you have any exceptions, and if you have, we will go into the robing room.

MR. ROTHWELL: Your Honor, I would like to reserve the opportunity to put on one brief rebuttal witness.

THE COURT: Have him here tomorrow in the morning, and if we have to go over into the afternoon, we will do it.

MR. ROTHWELL: He will be very brief.

MR. ABRAMS: Who is he?

MR. ROTHWELL: I don't know.

Your Honor, do you permit counsel to make a slight reference to the charge?

THE COURT: I hope in my rulings on the charge you will be in position to know what I am going to say to the jury. If you have to refer to the law, you may, but I don't like the lawyers referring to the law because I may be forced to come in and say, "Forget what he is telling you; it is not true." You don't want to be in that position, it seems to me. I think you should argue the facts. To the extent you may have to make some reference to the law it is all right. I think you get yourself into a box sometimes when you refer to the law.

MR. AGOGLIA: What I was going to ask your Honor, in view of the rather prolix exchange between all counsel on the question of clear and convincing, could I ask your Honor to at least give us some idea on that alone? What type of language you would use?

THE COURT: The very same as to the fourth element of actual malice: It has to be clear and convincing. I have great difficulty. I worked all day Saturday. I looked at Woodby against Immigration Service, and they can't make up their minds in the Supreme Court.

(Whereupon, an adjournment was taken to June 8, 1976, at 10:00 o'clock a.m.)

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J. Gordon Edwards, et al.,

-vs-

73 Civ. 3153

The National Audubon Society, Inc., et al.

New York, New York
June 8, 1976--10:20 a.m.

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a.m.

(Trial resumed - jury present)

ROBERT S. ARBIB, JR., resumed.

THE CLERK: Mr. Arbib, the Court wishes you to know that you are still under oath.

THE WITNESS: Yes.

CROSS-EXAMINATION CONTINUED

BY MR. ABRAMS:

Q Yesterday you testified that you could not identify who the source was for the information contained in the four paragraphs in the Foreward of American Birds which I was reading to you. Do you recall that?

A Yes, I do.

Q Was it one person, Mr. Arbib?

A It was probably more than one person, yes.

Q Do you recall giving a deposition in this case, Mr. Arbib?

A Yes, I do.

Q I will read to you from page 41 of the deposition.

See if that refreshes your recollection, line 9:

"Q Going to paragraph 2, starting with the language, 'We are well aware' Mr. Arbib, can you tell us what your understanding of that was at that time? That is, what is your 'We are well aware' referring to? Of what were you well aware?

"A I had been told by a member of that staff of National Audubon and I am not certain who it was --

"Q What had you been told?

"A He asked me a question, do you realize that your Christmas Bird Count data is being misused by representatives of the chemical -- agricultural chemical industry and this was news to me. He went on to tell me what in his view had been said or how our data had been used. He suggested that I might make editorial comment warning our readers to beware of such misuse.

"I then prepared these paragraphs."

Does that refresh your recollection that it was one person who gave you this information?

A Yes, it does.

Q Was the person a man or a woman?

A A man.

Q Was the man older than 50 years old, to the best of your recollection?

A If I could recall who it was I would know the age of the person.

Q That is why I am trying to help you.

A Yes.

Q Do you have any recollection as to the age of the person?

A Well, it was probably middle age, because most of the people that would be included in this would be of that age.

Q Was your conversation in the morning or in the afternoon or in the evening?

A I don't recall that.

Q Was it at work?

A Yes.

Q Was it at your office?

A Yes, it was at work.

Q Was it in your personal office or in someone else's office?

A No, it was in someone else's office.

Q And it was a face-to-face conversation?

A Yes.

Q There was a time, was there not, Mr. Arbib, when you thought that person was Mr. Clement?

A I was undecided whether it was Mr. Clement or Mr. Line.

Q Let me read to you --

A It may have been both.

Q I am sorry?

A I say, it may have been both.

Q My question now, there was a time, was there not, when you thought Mr. Clement was the person you had been talking to?

A Yes.

Q Did something happen to change your mind about who you thought the person was or was not?

A No, it was just general uncertainty. Upon reflection I was not positive that it was Mr. Clement.

Q Did Mr. Clement tell you it was he?

A I don't believe he did, no.

Q Let me read to you from your deposition at page 42, line 22:

"Q Can you at this time remember the individual that transmitted this information?

"A No, I really -- I am very unclear about it. My recollection was that it was someone that was wrong because the person that I had in mind as having told me this said to me later, no, I didn't tell you that.

"Q Who was that individual?

"A So, I am confused about it. I had believe it was Mr. Clement."

Does that refresh your recollection at one time you did think it was Mr. Clement?

A Yes, I did.

Q Now, you testified yesterday that between the second and third telephone calls made to you by Jack Devlin of The Times, you spoke with Mr. Clement? Is that right?

A Yes.

Q How long was that conversation?

A Five or ten minutes.

Q Where was it?

A In the office.

Q What did you say to him?

A I told him that Mr. Devlin was attempting to get the names from me of the person or persons whom we were charging in the editorial with working for the chemical industry or not knowing what they were talking about and I told him I didn't know any names. I asked him what he thought about giving Mr. Devlin any names.

Q Did you say to him that he had asked you, that Jack Devlin had asked you who could be said to be paid liars for the chemical industry? Didn't you say that to Mr.Clement

A It is possible that I said that, yes.

Q Let me read to you from page 85 of your deposition, line 6:

"Q Could you to the best of your recollection tell us the substance of that conversation that occurred, sir?

"A Yes, I said that Mr. Devlin had read the editorial comments about the DDT controversy and the warning that I had given the readers, which he had previously seen and approved, and that Mr. Devlin was now and, I think, I used the word bugging me for the names, any names of persons I could -- who could be said to be paid liars for the chemical industry, that I was, that I had refused him these and that he was back again today."

Does that refresh your recollection that that is what you said to Mr. Clement?

A Yes, that is essentially what I said a minute ago.

Q What did Mr. Clements say to you?

A As I recall, he said, "We are not calling anyone specifically paid liars, but we do have names of people who have consistently misused the information that we publish. We have pointed out to them repeatedly the errors of their writings, but they have persisted," and he said to me, "I have prepared an article for an environmental journal which lists the names of these misusers of our material," and he believed it would be all right to give the names to Mr. Devlin as long as we qualified this by saying, "We don't have any knowledge of anyone being paid liars, and all we want to say is that they have been consistent misinterpreters of the information in American Birds.

Q By the way, when you showed the Foreward to Mr. Clement at the time when it did not have the words that he added and at the time when this line down here read, "Anytime you hear a scientist say the opposite, you are in the presence of someone who is being paid to lie," when you showed this to Mr. Clement, did Mr. Clement say, "Whom are you talking about?"

A Did he say that to whom?

THE COURT: When? I gather that this witness says he showed the article to Mr. Clement before it was published.

MR. ABRAMS: I am thinking about that time period.

Q Prior to publication and prior to the additional language being added, did Mr. Clement, when you went to Mr. Clement's office and he read the article, did he read the whole article, the whole Foreward?

A Yes, he did.

(Continued on next page.)

Q Did Mr. Clement say to you in words or substance, "Who are you talking about? Who is being paid to lie?"

A Well, we both looked upon this as a generalized warning.

Q I want to know what Mr. Clement said to you, sir?

A He did not say that to me.

Q Now, when the article appeared in the New York Times, the 14th of August, 1972, where were you?

A I was at an annual meeting of the American Ornithologists Union at the University of North Dakota in Grand Forks, North Dakota.

Q And how did you learn about the publication in the Times of the August 14 article?

A I received a telephone call from Mr. Clement.

Q And did Mr. Clement then read to you the letter which has been marked as Plaintiff's Exhibit 3?

I will get a copy.

Do you have the marked copy?

MR. ROTHWELL: Exhibit 3 (handing).

Q I hand you Plaintiff's Exhibit 3, the letter of August 14, on the stationery of the National Audubon Society, with your name at the bottom, and on top of that "(Signed for Arbib by RCC after telephone consultation; Arbin in North Dakota at AOU.)"

Did Mr. Clement read to you the text of this letter on the telephone?

A I am not certain that he read it all. He probably read it all. I should explain that when I talked to Mr. Clement, I was at a -- it was a coffee break during the paper session, the morning paper session, and I was in a hallway, or like a reception room with about 200 people drinking coffee and talking very loudly.

I have a hearing problem which stems from World War II and I had a very hard time hearing Mr. Clement. I got snatches of words and phrases when he read me the article, or the article and the letter. It was very confusing for me.

I believe I expressed my dismay at the article to him, and my unhappiness with the wording of the letter.

Q Now, what unhappiness did you express with the working of this letter, Plaintiffs' Exhibit 3?

A Well, it was not my writing, it was not in my phraseology or the words I would use. I would have written a completely different letter if I had written one explaining that --

I just want you to tell the jury now what you said on the telephone, as best you recall it now, to Mr. Clement about the letter that was read to you.

A I believe I said to Mr. Clement, "Can't we delay the letter till I get back so I could work on it?" Words to that effect. I was unhappy with the letter.

Q What did Mr. Clement tell you in response to that question, whether the letter could be delayed?

A Our memories differ on this.

THE COURT: We are not interested in anybody else's memory, only yours.

THE WITNESS: All right, yes, sir.

Q What is your memory as to what you said to Mr. Clement, as to what he said to you after you said, "Can't we delay sending this letter"?

A He either said, "I have already sent it," or, "It has to go out today."

So I looked upon it as more or less a fait accompli. There was nothing I could do about it.

Q Didn't Mr. Clement say to you that the letter has already gone to the Times? Isn't that your recollection?

A That was my recollection, yes.

Q And that is your recollection, isn't it?

A Well, actually, I have talked to Mr. Clement since then.

Q I don't want to know what Mr. Clement told you. I want to know what you recall about what he said to you.

Isn't what you recall that Mr. Clement said to you, "It has already gone to the Times"?

A As far as I can recall, that is what he said, yes.

Q Now, you heard, did you not, the fourth paragraph read to you? The fourth paragraph starts out, "Nor do we like to call people liars...", and then it continues.

You heard that read to you, didn't you, when Mr- Clement spoke to you on the phone?

A At this point, I don't remember what part of this letter I heard clearly.

Q Let me read to you from your deposition and see if that will help you recollect. Page 121, line 10, and the line does refer to the fourth paragraph:

"Q You heard the sentence during the telephone call, is that right?

"A Yes ."

Now, does that refresh your recollection that you did hear that line at least?

A Well, that was almost two years ago, and it was closer to the facts, so it is probably correct.

Q Did you make any comments in reference to that sentence, that fourth sentence, which starts, "Nor do we like to call people liars," at the time it was read to you?

A As of today, I don't recall what my comment might have been.

Q I'd like to show you now a document which has been marked for identification as Times Exhibit UU. It is an internal memorandum of the National Audubon Society.

MR. AGOGLIA: Your Honor, may we be heard at the side bar for a moment, please.

(At the side bar)

MR. AGOGLIA: I think consistent with your previous rulings--this is dated 15 August '72--any of the charges were ended on the 14th. The letter of Mr. Arbib, which was written by Mr. Clement, or the previous Foreward, there is no claim that that in any way is a part of the libel in this case, and I think your Honor ruled that anything subsequent to the charged libel is not admissible, and so I object to it on those grounds, if your Honor pleases.

MR. ABRAMS: I am not urging it for admissibility in any sense as bearing on the accusations against Audubon. It seems to me it is an admission against interest by Audubon in that the day after that telephone call, that the witness has testified to, the gentleman he spoke to still believed that the New York Times reporter probably asked, "Who did you consider liars?" and Arbib was trapped into listing people he called liars.

THE COURT: Do you mind if I read?

(Pause)

THE COURT: The trouble with this, this is all supposition on Clement's part.

MR. ABRAMS: This is after Clement spoke to Arbib.

THE COURT: Arbib was probably incautious. How does he know?

MR. ABRAMS: The only sentence is this one (indicating). That's the day after the witness spoke to him on the phone.

THE COURT: He doesn't say, "Arbib told me that Devlin asked him whom."

He says Devlin probably asked him. He is assuming Devlin may have done.

MR. ABRAMS: He shouldn't be assuming it if this witness had told him the day before.

THE COURT: I sustain the objection on that basis

(In open court)

THE COURT: This does not preclude you from using that in connection with some other witness.

MR. ABRAMS: I see. I have no further questions.

THE COURT: Do you have cross-examination?

MR. ROTHWELL: Yes, your Honor, I have not examined this witness.

CROSS-EXAMINATION

BY MR. ROTHWELL:

Q Mr. Arbib, I just have another little something that might help you remember who told you about the material which appeared in the four paragraphs -- the material that appeared in the four paragraphs:

"We are well aware that segments of the pesticide industry," et cetera.

Then concluding on the fourth, "Any time you are in the presence of a scientist," et cetera.

You are familiar with the language, I am sure.

A Yes.

Q And Mr. Abrams has asked you some questions about your statement in the deposition. I am not going to review that. As you say, it was a while ago.

Your deposition was the 21st of November 1974.

A Yes.

Q It was quite a while after you had written those four paragraphs.

And you said here yesterday, I think, didn't you, that your recollection today, 1976, is that there were maybe three or four people who had told you that?

A There could have been three or four people.

Q Did you execute an affidavit last December on this subject?

A Yes. Yes, I did.

MR. ROTHWELL: May I approach the witness, your Honor.

Q Is that a copy of your signature?

A Yes, sir.

Q And the date is 5 December 1975?

A Yes, sir.

Q That wasn't so long ago.

Would you read paragraph 2 to the jury, please, at this point?

MR. AGOGLIA: If he wants to read it to himself, I have no objection. I don't think it is in evidence.

THE COURT: It is an affidavit on file in this court. He may read it.

A "I wrote the foreward to the April 1972 issue of American Birds. The substance of the foreward was suggested to me, in general terms, by Roland C. Clement, Staff Biologist and National President of the National Audubon Society."

Q Thank you, Mr. Arbib.

Does that refresh your recollection about the events?

A That does not rule out the fact that there may have been other people.

Q Excuse me, does that refresh your recollection about the events?

A Those -- I don't think that makes it any clearer in my mind, whether it was Roland Clement or Roland Clement and other people.

Q Yesterday, I think you talked about the Christmas Bird Count, and did you characterize that as -- I think I heard you use the words "bird golf."

Did you use that phrase?

A Not yesterday.

Q Not yesterday. But you said something to the effect, when Mr. Agoglia was examining you, you said something to the effect that the Christmas Bird Count was a game, did you not?

A I said a supporting and social event.

Q A supporting and social event, is that all it is?

A No, sir.

Q It has other aspects to it?

A It has scientific uses. I particularly stressed the point that it could be used for determining where birds are at that time of the year across the continent, much more than determining the populations of those birds.

(Plaintiffs' Exhibit 27 marked for identification.)

Q Mr. Arbib, are you familiar with this brochure? It is entitled --

MR. AGOGLIA: Your Honor, I don't believe we have seen this.

May we have a look at it, please?

THE COURT: If he offers it in evidence, you may see it. He is merely asking the witness if he ever saw it.

A Yes, I have seen this.

THE COURT: Just describe what it is.

THE WITNESS: It is a little folder or brochure describing the activities of the Audubon Society. It is called, "What is the National Audubon Society?"

Q Is that published by Audubon?

A Published by the National Audubon Society.

THE COURT: Now you may show it to counsel.

MR. ROTHWELL: At this time, I offer Plaintiffs' Exhibit 27, an Audubon published folder marked, "What is the Audubon Society?" into evidence.

MR. AGOGLIA: I have no objection.

MR. ABRAMS: I have no objection.

xxx (Plaintiffs' Exhibit 27 for identification received in evidence.

BY MR. ROTHWELL:

Q Would you look at the material on page 4 that starts, the first paragraph starts, "American Birds," and just read it to yourself?

A Yes, sir.

Q Have you seen that paragraph before in this brochure?

A Not for a long while. I must have seen it, though.

Q Do you agree with the statement that "American Birds, incorporating 'Audubon field notes', is a bimonthly journal devoted to the bird life of Canada and the U. S. Recently expanded and renamed, it has become an unrivaled source of information on the ever changing distribution, abundance and migratory movements of the North American avifauna"?

What is an avifauna?

A Bird life.

Q Do you agree with that statement?

A Yes, I do. There is no other magazine like it.

Q And that would include the activity which we have been calling Christmas bird counts as "an unrivaled source of information on the ever changing distribution, abundance and migratory movements"?

A As I just stressed, the important aspect of the Christmas bird counts are distribution --

THE COURT: That is not the question being put to you.

The question is, does that sentence refer to your bird count? Yes or no.

THE WITNESS: In part, it does, yes.

Q In the Audubon Society, who has the initials RSA, who uses the initials RSA?

A I do.

MR. ROTHWELL: I ask this be marked Plaintiffs' Exhibit 28 for Identification.

xx Tk3
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a.m.

(Plaintiffs' Exhibit 28 marked for Identification.)

Q Looking at Plaintiffs' Exhibit 28, the editorial note, is that something that you wrote, Mr. Arbib?

A Yes, indeed, I wrote every word of it.

MR. AGOGLIA: I have no objection.

MR. ABRAMS: I have no objection.

xx

(Plaintiffs' Exhibit 28 received in Evidence.)

Q Mr. Arbib, you spoke yesterday of improved methods of getting to the bird count areas and improved methods of teaching people about birds and so forth?

A Yes, sir.

Q That includes Field Guides?

A Yes.

Q Field Guides would be a book published with drawings of birds and identification and clues as to how they may be found?

A And recordings, recent development.

Q That includes snowmobiles, helicopters, in terms of better access?

A Yes, various kinds of vehicles.

Q Has that happened largely in the last 10 or 15 years as compared with the period 1940 to 1960?

A Well, of course, during the war years there was a natural fall-off of bird counts and people involved and gasoline rationing and everything else, but after 1946 there was rapid development of various means of access, and that was when the big road building programs began.

Q Roger Tory Peterson is a well known name, a well known figure in this field?

A Very much so.

Q He has written some of those identification booklets that you call Field Guides and so forth?

A He has written some of them. There are many other authors, yes.

Q I show you Plaintiffs' Exhibit marked for Identification No.13 entitled --

THE COURT: Show it to the witness and have him identify it.

THE WITNESS: Do you want me to read this?

MR. ROTHWELL: No.

THE COURT: Have you ever seen that?

THE WITNESS: In this form, no, sir. I know most of the information about Mr. Peterson.

Q In this form is this not a page from the Audubon Magazine making an announcement about Roger Tory Peterson?

A I don't know that I saw it in Audubon. If you say it is, I will agree with you.

Q You cannot identify this as an exhibit from Audubon Magazine?

A Well, there is nothing to identify it as being a page from Audubon. I assume that it is.

MR. ROTHWELL: We don't want you to function on the basis of assumption.

I show it to counsel.

THE COURT: Any objection?

MR. AGOGLIA: If he represents it is from Audubon Magazine. There is nothing on it so that I can identify it.

THE COURT: Mr. Abrams?

MR. ABRAMS: No objection.

xx (Plaintiffs' Exhibit 13 received in Evidence.)

Q Plaintiffs' Exhibit 13 contains a story that Roger Tory Peterson was named as an Audubon medalist, that he won honors from the Audubon Society, published in the January, 1972, edition of Audubon Magazine? You were employed during that time?

A Yes.

Q Do you remember the event?

A I attended the dinner, yes.

Q You attended an award dinner?

A Yes.

Q He is a pretty eminent gentleman?

A Yes, he is an old friend of mine.

Q Is he an authority on birds?

A Very much so.

Q I hand you an exhibit marked for identification, Plaintiffs' Exhibit 12. Can you identify that?

A I don't believe I have seen this before, no, sir. It says it is a page from Audubon Magazine.

Q It is a page from Audubon Magazine. Is there any doubt in your mind about that?

A No.

MR. ROTHWELL: Counsel has seen this. I offer Plaintiffs' Exhibit 12 in evidence.

MR. AGOGLIA: I have no objection.

MR. ABRAMS: No objection.

xx (Plaintiffs' Exhibit 12 received in Evidence.)

THE COURT: There is no date on it.

MR. ROTHWELL: On the bottom.

Q Reading from Plaintiffs' Exhibit 12, Mr. Arbib, the seventh paragraph reads:

"A total of 27 people from 25 localities took part in the first Christmas count in 1900. In succeeding years the count became so popular that by 1971 the number of participants grew from that small nucleus to 18,798, representing 963 areas. That report (like the preceding sixteen reports it was edited by Allan Cruichshank) is exactly one inch thick. Analyzed intelligently, these counts, as well as the seasonal repots of field observations in various parts of the country that have been published since 1918 under the title of "The Season," tell us much about the population trends of birds. From the conservationist's point of view, shifts in bird populations are excellent indicators of the environment-a sort of 'ecological litmus paper.'"

Do you agree with that statement? Do you want to see it? I want to know if you agree with that statement.

A Yes, I would agree with it, with the emphasis on the phrase "analyzed intelligently," and the phrase "as well as the seasonal reports of field observations in various parts of the country."

Q But, certainly, do you regard this language as being supportive of the scientific or the authoritative use of the Christmas Bird Count data when analyzed intelligently, as you said?

A By analyzed intelligently, I mean publishing and knowing all the various pitfalls and the various flaws in the data that is collected in this way.

May I expand on this a little?

THE COURT: No.

Q You have answered the question. But are you saying that the data itself is not reliable?

A There are many unreliable factors in it, yes, sir.

Q We understand that those factors would affect the conclusions to be drawn from the data. But the data is the best thing we have, is it not?

A Understood intelligently, it is.

Q Now, when you wrote these four paragraphs in the Foreward we have been talking about here, were you talking about the unreliability of the data or the unreliability of the conclusions based on the data, Mr. Arbib?

A Both, really.

Q In other words, whoever the scientist spokesmen whom you wrote about being paid liars, they were not using the correct data? Is that what you were saying?

A They didn't understand the data or if they did they were misusing it.

Q Were they using the correct data? Did they put phony figures in the computer? That is basically what I am asking. Is that what you mean, that the people who were involved in this charge were putting false figures in the computer and saying these are the figures for the Christmas

Bird Count? Is that what you meant?

A The figures in themselves were partly false and the interpretations of them were incorrect.

Q And it was the interpretations you hd a problem with?

A Yes, both, because these people didn't understand and did not know the weaknesses-- maybe they did -- I don't know -- in the data itself.

xx (Plaintiffs' Exhibit 29 marked for Identification)

Q Mr. Arbib, I show you a memorandum that says --

THE COURT: Show it to him and see if he can identify that.

Q Can you identify that?

A Yes.

Q What is it? It is a memorandum from Mr. Clement to various persons, including yourself?

A Yes.

B2 Q You were one of the people to whom the memo was sent?

A Yes.

Q And you have seen it before?

A Yes.

MR. AGOGLIA: May I see it?

THE COURT: Any objection?

MR. ABRAMS: No, your Honor.

MR. AGOGLIA: No objection.

xx (Plaintiffs' Exhibit 29 received in Evidence.)

Q I would like to read to you from this memorandum Point 2:

"Arbib did not accuse any particular individuals of lying, though he did say that those who misused our data were either 'being paid to lie, or parroting something he knows little about.'

"He did, by interview with Devlin, identify White-Stevens, Jukes, Borlaug, Stevens and Edwards as notorious misusers of our data, and implicitly either paranoic, incompetent, or intellectually dishonest."

You say you received this and read this memo?

A Yes, I did.

Q Did you reply to it?

A I don't believe I did. I may have.

Q Is this a correct statement of the Audubon position in reference to Dr. Edwards, Dr. White-Stevens, and Dr. Jukes?

MR. AGOGLIA: I object to it. This is a statement by Mr. Clement.

THE COURT: True.

MR. ROTHWELL: I beg your pardon. I didn't hear the Court's ruling.

THE COURT: This is a memorandum by Dr. Clement. This is not what he said.

MR. ROTHWELL: You say sustained?

THE COURT: Yes, unless you want to ask him whether that is what he said to Devlin.

MR. ROTHWELL: Yes, I do, your Honor, and thank you.

Q Is this a correct account, although by Mr. Clement of what you said to Devlin during one of the conversations with him?

A No, sir.

Q It is not?

A I did not use any of those words.

Q I note the date was August 14, and at that point where were you?

A In North Dakota.

Q Do you remember what time you got back?

MR. AGOGLIA: You mean what date?

Q How long were you out there? When did you get back?

A That week. I went from there to Winnipeg, Manitoba, and then I came home.

Q When you went to the office you found a pile of mail on your desk, I presume?

A Yes.

Q And this was one of the items you found there?

A I don't recall that, but it must have been.

Q What is your testimony as to your response to this?

MR. AGOGLIA: I object. That has been asked and answered, if your Honor please.

THE COURT: Sustained.

Q I want to go over with you that telephone conversation you had with Mr. Clement on August 14 relating to this letter.

Now, you have explained to Mr. Abrams, counsel for The New York Times, that this letter was read to you. I could not understand whether it was read to you in whole or in part.

A I am not certain of that either, sir. I only heard it in part. It may have been read to me in its entirety.

Q Was there anything else read to you?

A Well, either parts or the whole of The Times article, yes.

Q What was said by Mr. Clement other than just reading, saying, "Here is what appeared in The Times this morning," and reading the Devlin article in whole or in part, and "Here is what we propose to do and send out over your signature," and then reading you this letter in whole or in part, what else was there to that conversation?

A I am afraid I really would be guessing as to that, sir. I do remember my displeasure and feeling of a betrayed trust in Mr. Devlin. I may have spoken of that to Mr. Clement.

MR. ABRAMS: I object. The witness is not responding.

THE COURT: We want to know what you said.

THE WITNESS: I can't recall the exact words. I was displeased with the article.

THE COURT: There are two things here: One is what you felt and the second is what you told Clement. Now, you can break it into two parts. What did you tell Clement?

THE WITNESS: I would just be guessing.

THE COURT: Wait, don't guess. What did you find objectionable in that letter?

THE WITNESS: Well, it had my signature on it and it was not my letter and it was not the kind of letter or the content of letter that I would have written.

THE COURT: In what respects is it not the kind of letter or does it not reflect what you would have put in a letter?

THE WITNESS: I think the letter that I would have written would have been perhaps more conciliatory; I would not not have used phrases such as "Devlin's punchy piece," and I think I would have explained to The Times more in detail my position, which was that we had specified that no names could be used together with such words as "lying" or "liars." I don't believe that is in this present letter.

Q Did you tell Mr. Clement during the occasion of that phone call that Devlin had done something that you told him not to do? Did you express that to Mr. Clement?

A I believe I did.

Q During that phone call?

A I believe so. I had never expected to see the article in that form.

Q And today it is your testimony that you told Mr. Clement during that phone call -- was there more than one phone call or just the one?

A Mr. Clement had tried to reach me several times. We talked once.

Q Is it your testimony this morning that during that phone call you told Mr. Clement that Devlin had -- what was your word -- had "betrayed", "sense of betrayal," is that the way you would express it?

A I felt my trust in him had been weakened.

MR. ABRAMS: I object to the answer. The witness is not responding to what he was asked. He was not asked what he felt.

THE COURT: I will allow it.

A I don't know whether I said that to Mr. Clement. I told him that I told Devlin that I did not want this to appear in the press and it did appear that way.

Q Monday, August 14, 1972?

A Yes, sir.

Q How long since had you talked to Mr. Devlin? Was it in late July or --

A Late July or early August, yes, sir.

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Q Did you, at that time, remember your conversation with him very vividly?

A With Mr. Devlin, yes.

Q On this day, August 14?

A Yes.

Q It was fairly fresh and recent?

A Yes.

Q Your talk?

A Yes.

Q And about your admonition to Mr. Devlin? Did you ever tell him that until after your return? Did you tell him that before you left for Grand Forks, that you had given Mr. Devlin the names and that you had told Mr. Devlin what you testified you told him?

A Did I talk to Mr. Clement about this?

Q Yes.

A We had a clear understanding as to what I would tell Mr. Devlin, and I did so.

Q What was that understanding?

A That we would limit our remarks about these gentlemen that we were naming, that they had misinterpreted and misused the information published in American Birds or in our Audubon Field Notes, as it was then called.

Q What is your testimony now, your best recollection about what you said to Clement during that phone call on August 14, from North Dakota to New York City?

MR. AGOGLIA: I am going to object to this as being exhaustive.

THE COURT: Overruled.

A He read it to me, and I made some kind of remark, such as, "I will be damned!" or "Damn it!" or something like that, and I expressed in some words that I don't recall my shock and displeasure at the way this article had appeared, and I was astonished, astounded that The Times would publish an article with a headline like that.

MR. ABRAMS: I object to the response as unresponsive and ask that it be stricken.

THE COURT: Overruled.

Q Are you finished with your answer?

A I think so, yes, sir.

Q Now, after you delivered your reaction did Mr. Clement say anything to you?

A He said, in effect, "We have to write a letter to The Times and I have done so, explaining our position," and then he read me either the whole letter or most of it. I don't remember how much of it I heard.

Q Did you make any response?

A To the letter?

Q After --

THE COURT: We have been through that.

Q May I read you from page 113 of your deposition, the same deposition that Mr. Abrams used, line 23:

"I also said to him that I didn't feel that it was a conciliatory letter."

THE COURT: He has already said that here on the stand.

Q Did Mr. Clement bring the word "conciliatory" in?

MR. AGOGLIA: I object.

THE COURT: Sustained. The witness said he does not feel it is conciliatory and he told it to Mr. Clement.

MR. ROTHWELL: No further questions.

MR. AGOGLIA: I have been asked by counsel for the plaintiff to substitute an unmarked book for the one that has been marked Plaintiffs' Exhibit 2, and may I do that with the Court's permission?

THE COURT: Yes.

MR. AGOGLIA: No further questions.

(Continued on next page.)

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MR. ABRAMS: I have a little recross, your Honor.

RECROSS EXAMINATION

BY MR. ABRAMS:

Q Mr. Arbib, when you spoke to Mr. Clement from North Dakota, do you recall making any comments to him at all that the letter that was sent under your name should have contained the protest about the use of the word "liar" by the New York Times?

A Do I recall that? Is that the question?

Q Yes.

A I don't recall that now, sir.

Q Now, did you at any time after the 14th of August 1972, ever personally write a letter to the Times saying that the Times story was erroneous and that you had not called these people "paid liars" or anything like it?

MR. AGOGLIA: Objection, your Honor.

THE COURT: Sustained.

MR. ABRAMS: It seems to me it has been opened up, your Honor, by --

MR. AGOGLIA: Your Honor --

THE COURT: Sustained.

MR. ABRAMS: I have no further questions.

THE COURT: You may step down.

(Witness excused)

ROLAND C. CLEMENT, residing in Norwalk, Connecticut, called as a witness by Defendant Audubon, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. AGOGLIA:

Q Mr. Clement, would you tell us your position with the Audubon Society in 1972, and, more particularly, in July and August thereof?

A I was Vice President for Biology, which means that I had overview of the scientific validity of Audubon Society positions.

Q And would you tell us, sir, a little bit about your educational background?

A It is a very complex background. I began with about eight years in business and decided that this was a dead end and went back to school.

I studied wild life management at the University of Massachusetts in the Stockbridge School of Agriculture for two years, worked for the Massachusetts Fish and Game Division for one season in the field, then spent three and a half years with the U. S Weather Service, two years of this in the Subartic Canadian Labrador.

Then, after the war, I matriculated at Brown

University, got a Bachelor of Arts Degree with a major in botany and a minor in geology, including a lot of work in zoology.

After Brown University, I went to Cornell University and got a Master of Science Degree in Wild Life Conservation.

After that, I took a position with the Audubon Society of Rhode Island as their first professional executive director, spent eight years in Rhode Island, and then was invited to join the staff of the National Audubon Society in New York. I worked in New York from 1958 to the present.

Q Now, in evidence, sir, as an exhibit lettered D, entitled, "A Pesticide Controversy," that was written by you, was it not, sir?

A It was.

Q In late July of 1972, was that still in draft form or had it gone to the printer?

A It was in manuscript on my desk.

Q And sometime in either late July or early August, did a gentleman named Mr. Arbib come to you and make inquiry about that particular article?

A Not about the article per se.

Q Okay. Did he make any mention to you about a telephone call he had had with someone from the New York Times? Just yes or no, please.

Q As a result of that, did you have a conversation with him?

A Yes.

Q And what did you do as a result of that conversation?

A I advised Mr. Arbib --

Q And could you tell the Court and the jury what advice you gave him, please?

A Mr. Arbib showed me the draft of the foreward that is in contention here, asked me to check this for accuracy, and acceptability as an Audubon publication.

I read the statement carefully, accepted it as his own version of what he thought was the case, but recommended the addition of a clause, because in the foreward, he said that people who misused our data might be paid liars.

So I suggested adding "or parroting something they know little about."

Q Now, Mr. Clement, I would like to go back from that point for a moment and I will pick up a little bit later from that point.

How long have you been involved in the controversy involving bird counts and the effect of DDT on bird life in this country?

A Since 1963.

Q And were you familiar with the three plaintiffs in this case, or at least their writings?

A I was.

Q And had you debated any of them during that period when the controversy was raging, that is, from 1963, let's take, to 1972?

A I debated Dr. White-Stevens in public three times on this issue.

Q And, sir, in 1972, do you know the date the Ruckelhaus ruling came down which banned DDT?

A I believe it was June 14th.

Q Of what year?

A 1974, I'm afraid.

THE COURT: 1974, he said.

Q Just check your memory for a moment, please. I think it is a matter of conceded fact.

THE COURT: No, not conceded in this trial yet.

A It is a matter of record. My memory may be poor on this point.

Q In any event, Mr. Clement, were you familiar with the writings of the three plaintiffs in this case?

A Yes, sir.

Q And had you in that manuscript that is before you, which we call D, written a critique of their writings only pertaining to the effects of DDT on bird life and bird population in this country?

A Essentially, yes.

Q And that is all contained in that document which we call Exhibit D, is that right, sir?

A This article is a critique of the false views, as I think, put forward by the plaintiffs relative to the implications of the use of DDT,in particular, and bird populations.

Q Okay. Now, are any of the plaintiffs ornithologists?

A No, sir.

Q You would concede, would you not, sir, that if, in their field of expertise, they talked about medical biologists, they are quite expert in their field; would you concede that?

A Yes, sir.

Q And in their field of expertise, they have a good reputation; would you agree with that?

A I do.

Q In the field of DDT and the effects on --

MR. ROTHWELL: Excuse me, counsel.

Objection to the form of this line of questioning.

THE COURT: Overruled.

Q In the field of DDT, sir, and the effects on bird life, in your opinion, based upon a reasonable degree of scientific certainty, is that within the realm of the expertise of any of these plaintiffs?

A It is not.

THE COURT: Is it within the realm of the expertise of this witness?

Q Is it within the realm of your expertise, sir?

A Yes, sir.

Q How many years of your life have you devoted to this aside from your studies?

THE COURT: To what?

Q To the study of bird life and specifically to the effects of pesticides on the bird population.

A I have been a student of birds since the age of 7, did scientific work very specifically in -- during World War II and then, again, in 1957 and 1958 on museum expeditions to Canadian Labrador and became involved in the study of the pesticides problem when I first came to National Audubon Society in 1958.

Q And, sir, would it be fair to say, or do you consider yourself, rather, an expert in this particular field, that is, the effects of pesticides upon bird life in this country?

A I was an expert.

Q I ask you this, sir, do you have an opinion, based upon a reasonable degree of scientific certainty, as to whether or not the use of Christmas bird counts as contained in your book could form a valid basis for a hypothesis that DDT is totally innocuous in its effect on bird population? Just yes or no.

A I have such an opinion.

Q Would you tell his Honor and the members of the jury what your opinion is?

A My opinion, as stated in several publications and in public discussions of this controversy over the years, is that the Audubon Christmas data cannot be summed up the way they have been summed up by the plaintiffs, and, therefore, are invalid in discussing the question of whether bird populations have been affected or not affected by DDT.

Q Now, would you tell his Honor and the members of the jury the reason for that opinion or the reasons for that opinion?

A The reasons for my opinion: A study of the implications of the data and their use.

Q Would you be a bit more specific, please?

A Well, specifically, the Audubon Christmas data, Christmas count data, cannot be summed up because of the many variables involved in the gathering of these data. I, myself, for example, made a specific study of this question during -- while I was at Cornell University and I discovered by analyzing these data from the year 1900 to the present, at that time when I was at Cornell in 1950, that there were so many variables that they could not be used to compare populations from one period to another.

Q Sir, have you expressed that opinion to any of the plaintiffs in this case?

A I have directly to Dr. White-Stevens and indirectly to all of them through my publications.

Q Are you familiar with the literature that has been published by the plaintiffs in this particular area, aside from their other publications in the area of their expertise, in the effects of DDT on bird population?

A I am familiar with most of their publications.

Q Have these gentlemen in their publications used the Christmas bird count to justify the fact or conclusion that DDT has absolutely no effect upon the bird population in this society?

A Mr. Marvin, who was here yesterday, I believe, and Dr. White-Stevens did. The other people simply repeated what those first two people had said about the use of our data.

Q I would like to ask you, if I may, sir, there was testimony given yesterday by Mr. Marvin concerning robins and his observations on the increase in the number of robins in two locales in the Midwest.

Could you comment on the scientific accuracy of that, please?

A It has no scientific validity.

MR. ROTHWELL: Objection.

THE COURT: Do you object?

MR. ROTHWELL: Yes, I do.

THE COURT: Overruled.

Q And would you tell his Honor and the members of the jury why you come to the conclusion it has no scientific validity at all?

A Because the robin is one of the most widely distributed bird species in North America and you cannot assess a continental population by looking or keeping track of the number of robins that occur in a particular tree in your particular backyard.

Q There was testimony in this case about the Hawk Mountain Sanctuary.

Are you familiar with that study, sir?

A I am familiar with Hawk Mountain.

Q There was testimony given about certain birds that fly the Hawk Mountain area and counts that were made by Dr. White-Stevens.

Are you familiar with that testimony?

A In a general way. I heard it, yes.

Q And what was the bird that he was referring to?

A The osprey.

Q Would you tell us, sir, in your opinion, based upon a reasonable degree of scientific certainty, is it possible to draw a legitimate scientific hypothesis that the osprey population is increasing merely from the observations made at one location, in particular Hawk Mountain?

A It is not.

Q Would you be good enough to explain scientifically for his Honor and the members of the jury the basis for that opinion of yours?

A Once again, the problem is very much as in the case of the robin.

The osprey nests across the entire northern two-thirds of North America, in fact, from Florida northward, and, therefore, the number of ospreys that happen to fly by Hawk Mountain in Eastern Pennsylvania, during the fall migration, is no index to the status of the population of ospreys of North America.

Q Sir, did you know a Mr. Devlin from the New York Times prior to late July or early August of 1972?

A Yes, sir.

Q And did you repose trust and confidence in that man in your dealings with him as a representative of the New York Times?

A Yes, sir.

Q Sir, after you -- I want to go back now, if I may. I am trying to move along quickly, if you don't mind, sir.

I want to go back to the conversation you had with Mr. Arbib where you added to the draft of his foreward.

Do you recall that testimony?

A I do.

Q Thereafter, did you have a conversation with him in which he mentioned that a Mr. Devlin had called concerning the foreward that had been printed in the American Birds?

A Yes.

Q And could you tell us the substance of that conversation, please?

A Well, the second time Mr. Arbib came to me, he said, "Jack Devlin insists on knowing who we had in mind when we wrote this editorial."

And so I said, "Bob, I'm busy now, but I have discussed this entire controversy in manuscript, which I have here, and I will ask my secretary to give you a copy of this manuscript. Look it over for yourself and use whatever data you please."

Q Now, could you tell his Honor and the members of the jury what that manuscript consisted of?

A The manuscript now published is a discussion of what I consider to be the false claims of five individuals who are advocates of the continuing use of DDT.

Q But did the thrust of that article, which is there before you, Exhibit D, as you recall it, sir, talk about the use of statistics of increased bird population and the DDT controversy?

A That was part of the discussion.

Q Okay. There were other matters but would it be fair to say, since it is in evidence, the jury can read it, that that was the thrust of that article?

A In general, yes.

Q Okay. Now, subsequent to the publication of the article in the New York Times on the 14th, did the article in fact come to your attention? In other words, did you actually see it?

A Yes, that very morning.

Q And after seeing that, what did you do?

A Well, the article upset me greatly, because I knew --

Q Just tell us what you did, please, because I want to move on.

A I did apparently two things. I wrote a memo to staff, in-house, to alert them to the problems created by this article, and then I drafted a letter to the New York Times to rebut the article.

Q I show you Exhibit -- excuse me, sir -- Exhibit 29, and ask you if this is the memoranda, or memorandum that you wrote.

A Yes, it is.

Q Now, was this written before you had consulted with or was it after you had consulted with Mr. Arbib via telephone in -- wherever he was -- in North Dakota?

A Before consultation.

Q Now, after doing this, you say you drafted a letter?

A Correct.

Q And that is the subject matter which we call Exhibit 3, which I think you are familiar with, aren't you?

A I am familiar with it, yes.

Q And did you discuss that letter in words or substance with Mr. Arbib via telephone sometime later in the day of the 14th?

A Yes, I did.

Q Now, to your recollection, had the letter been mailed at the time you discussed it?

A It had not.

Q And could you tell us the substance of the discussion you had with Mr. Arbib via telephone on the 14th?

A Would you restate that, please?

Q I am going too quickly, I'm sorry.

I will withdraw the question, if you don't mind, and I will rephrase it.

Q Would you tell us, if you would, the substance of the telephone conversation you had with Mr. Arbib on the 14th of August?

A Yes. I telephoned Mr. Arbib to tell him about the article published in the New York times; expressed my dismay at the way it had been stated, read him the article from the New York Times.

He expressed his own similar dismay, and the I suggested to him that we needed to rebut this article immediately because it is my impression that the Times does not respond to letters from the public unless they come immediately after a news item has been published.

So I then read Mr. Arbib the draft of my letter. He objected to some of the phraseology, as you have heard in testimony this morning, but I said, "Bob, we can't rewrite the letter over the telephone. You are having enough trouble understanding me as it is."

He testified that his circumstances were difficult, a noisy hallway --

MR. ABRAMS: Objection, your Honor.

THE COURT: Sustained.

You just tell us what you did, not what he did.

A (Continuing) After reading my draft of the letter to Mr. Arbib, I suggested that it had to be sent right away and that was it.

Q And did you in fact send it?

A I sent it that evening.

Q Did you at any time in the entire controversy, whenever you got involved with the DDT controversy, vis-a-vis the bird population of the United States, ever call any of these plaintiffs liars?

A Never.

Q Had they ever accused you,other than in this lawsuit, of calling them liars?

A No, sir.

Q During your various debates with Dr. White-Stevens, did you ever indicate that he was a liar or any such thing as that?

A No, sir.

Q It would be a fair and accurate statement, would it not, that you did accuse them of misusing the bird counts to arrive at a scientific conclusion? Would that be correct, sir?

MR. AGOGLIA: Your Honor, I have nothing further. Counsel may inquire.

THE COURT: We will have a short recess.

(Recess)

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Tk5
B1
a.m.

(Jury in box.)

CROSS-EXAMINATION

BY MR. ABRAMS:

Q You have testified, Mr. Clement, as to how the phrase "or is parroting something he knows little about" found its way in the Foreward of American Birds, and that came from you, did it not?

A It did.

Q Was that the only change that you made in the Foreward that Mr. Arbib showed you?

A I believe so.

Q Do you know where Mr. Arbib got the information that is on the second page in the Foreward that he showed you?

A General background information. That is all.

Q Well, do you know where Mr. Arbib got the information referred to in the second paragraph, in which it is stated, "We are well aware that segments of the pesticide industry and certain paid 'scientiest-spokesmen' are citing Christmas Bird Count totals...", do you know where he got that information?

A I don't know.

Q Did he tell you?

A No.

Q Did you ask him?

A No.

Q Do you know where Mr. Arbib got the information in the next paragraph, where he wrote:

"This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving of reasons".

Do you know whom he was talking about?

A Nobody in particular. This is common knowledge in our field.

Q Well, can you tell us?

A Yes, I can tell you.

Q Who are the people who at the time this was published making false and misleading statements and distorting the facts for the most self-serving of reasons?

A The three plaintiffs in this case, plus two others I cited in my article.

Q Now, referring farther down, when Mr. Arbib showed you this, as you have testified, at the time he came to your office, it said, "Anytime you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie," did you ask Mr. Arbib if he had anyone in mind?

A No, sir.

Q Do you know if he had anyone in mind?

MR. AGOGLIA: Objection. It is the state of mind of someone else.

THE COURT: Overruled.

A I know he had nobody in mind, because he was not familiar with this group of people.

Q People that you were familiar with?

A Yes.

THE COURT: Didn't you object when he showed you an article in which he is calling five people liars?

THE WITNESS: Sir, he was not proposing to call anybody liars and did not call anybody liars in that Foreward

THE COURT: He did not?

THE WITNESS: He did not, sir.

THE COURT: I have already ruled as a matter of law that it is libelous per se, Mr. Clement. Now, you read in there that he was calling people liars. Did you object that he was calling people liars?

THE WITNESS: Your Honor, I am sorry, but that Foreward does not call anybody liars.

Q You said a moment ago that the plaintiffs in this case were amongst those who were saying things which were false and misleading and distorting facts for the most self-serving of reasons. What were those self-serving reasons?

THE WITNESS: Does your Honor want me to respond now?

THE COURT: Answer him.

THE WITNESS: Are you asking what I know or --

Q I am asking you what you know about those self-serving reasons.

A You must understand that Mr. Arbib's statement is a generic statement. It replied to the generality of the controversy which was raging at that time.

Q About three minutes ago, Mr. Clement, you said that five people named in The New York Times were in your view as you sit here amongst those about whom it might properly have been said then, people who made fals and misleading statements and distorted facts for the most self-serving reasons. I am asking you for the basis of that view.

A I would agree only with the first part of the statement. The self-serving I know nothing about, except in the case of one individual possibly, who is not a plaintiff in this case. But these people were misusing our data. They had been warned that their interpretations were invalid, but they persisted in collecting information and obfuscating the issue. That was the controversy.

Q Purposely?

MR. AGOGLIA: I object.

THE COURT: Overruled.

A I presume so, because they persisted.

THE COURT: You have in this article which was read and was shown to you before it was published for your comment --

THE WITNESS: The Foreward, your Honor?

THE COURT: Yes:

"Anytime you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie"?

THE WITNESS: Your Honor, that is exactly why I suggested a clause.

THE COURT: Why didn't you ask him to strike that first part, not add something?

THE WITNESS: Because that Foreward referred to nobody in particular.

THE COURT: Why did you add anything?

THE WITNESS: To soften the implication, because I happen to know that not everybody who makes these claims is lying; they may believe this; and I am convinced that many of them do. But there are other people who may be lying. We were involved in a continual American industrial controversy. There are people in industry who have lied about the facts for gain. But this did not necessarily apply to these individuals, and particularly in the case of Mr. Arbib it applied to nobody in particular, but he knew this was a typical case of obfuscation of evidence.

Q You don't know what Mr. Arbib knew?

A About what?

Q That this was a typical case of obfuscation of evidence.

A No, but I assumed so.

Q I don't want to hear what you assumed.

With reference to your telephone call that you had with Mr. Arbib when he was in North Dakota after The Times article appeared on the 14th of August, you did discuss with him, I think you said a few moments ago, The Times article?

A I read it to him, yes.

Q Did Mr. Arbib say anything to you when you spoke to him that the letter was not conciliatory enough?

A Are we talking about The Times article here?

Q Your letter.

A My letter I read to him and he said, "That is not my language," and I said something to the effect, "Look, we can't rewrite the letter over the telephone; time is of the essence. Let me send it over your name."

Q Now, you said that a reason for sending the letter was a necessity for rebutting The Times article?

A Yes, sir.

B2 Q Could you show us where in the letter you rebut so much of The Times article which attributes to Mr. Arbib and the Audubon Society the view that these plaintiffs are paid liars?

A Yes, the last paragraph does that. It says, "nor do we like to call people liars." I did not want to call Mr.Devlin a liar. I gave a rather ambiguous or soft rendering, a denial that we call people liars.

Q You understand the words "nor do we like to call people liars" to mean "we are not calling people liars"?

A Yes, sir. That is a soft rendering of a difficult statement. Otherwise, I would have to say Mr. Devlin lied in misusing our data, and I could not say that.

THE COURT: Why not?

THE WITNESS: Because Jack Devlin is an old friend of ours, of mine, and we don't like to confront The New York Times with what we consider to be errors of interpretation.

Q Mr. Clement, did you consider saying these people are not liars?

A I don't remember what I considered. I only know what I said.

Q Did you write any other letters to The Times saying in substance, "These people are not liars"?

A No, we sent this letter and The Times did not run it.

Q Did you write any letters to the plaintiffs saying The Times misquoted us; you are not liars; we don't mean that?

A No.

MR. AGOGLIA: I object.

THE COURT: Overruled. This is going to cross-examination of what the witness believed.

Q The answer was no?

A The answer is no.

Q Did you make any communication at all to either The Times or these plaintiffs, in addition to Plaintiffs' Exhibit 3, with respect to The Times article?

A No, sir.

Q Now, after you spoke to Mr. Arbib in North Dakota, was it your view at that time that he had been trapped by The Times?

A In a sense, because I knew that he had called nobody liars and I knew that my article called nobody liars, and yet when The Times appeared, these unconnected statements had been put together to make it seem that we had said somebody was a liar.

Q In fact, you don't know from your own knowledge what Mr. Arbib said on the telephone, do you?

A I do not.

Q Was it your understanding after you spoke to Mr. Arbib in North Dakota that the question he had been asked by Jack Devlin of The Times was, "Who do you consider liars?"

A There was no discussion of that question in our telephone conversation.

Q I would like you to listen to my question very closely.

Was it your understanding after your telephone call with Mr. Arbib, wherever the understanding came from, that the question that Devlin had asked was, "Whom do you consider liars?"

A No, sir.

Q I would like to show you now an exhibit marked Times Exhibit UU and ask you if you can identify it?

A I can.

Q Will you tell the jury what it is?

A It is a memo of mine written to Mr. Chaplin Bonds, who is administrative assistant to our president.

MR. ABRAMS: I seek its admission.

MR. ROTHWELL: No objection.

MR. AGOGLIA: I object, same grounds as I previously addressed to the Court at the side bar.

THE COURT: Overruled.

xx (Defendant New York Times Exhibit UU received in Evidence.)

Q I want you to tell us to whom this memorandum was sent.

A It was sent to Mr. Bonds.

Q What is its title?

A The Question of Liars.

Q Would you direct your attention to what I take to be the fourth paragraph, the line which begins, "Arbib was probably incautious in giving Devlin the names involved, something he got from me. Devlin probably asked, 'Whom do you consider liars?' and Arbib was trapped into listing people I have never called liars, though they may be."

Does that refresh your recollection, first of all, that after speaking with Mr. Arbib on the telephone and, in fact, the next day, it was your view that the question Mr. Devlin probably asked was, "Whom do you consider liars?"

A No, this is pure speculation. I did not talk to ARbib about this.

Q I did not ask you that. I asked you, Mr.Clement, the only thing I asked you, was it your view at the time you wrote this memorandum that the question that Mr. Arbib had been asked by Mr. Devlin was probably, "Whom do you consider liars?"

A No, I do have a view, but it predates everything you talking about.

Q I want to know our view when you wrote this memorandum. Did you believe at the time you wrote this memorandum that the question that Devlin had asked Arbib was probably, "Whom do you consider liars?"

A No, I was speculating. Now, if you want to know my view --

MR. ABRAMS: No.

MR. AGOGLIA: I submit it has been answered.

THE COURT: I submit it has not been answered.

Q Do you have anything to add to your answer that you were speculating?

A I would like to explain by telling you what I know.

Q Do you have anything to answer to the question I asked in addition to saying that you are speculating?

A I say the memorandum is speculation.

THE COURT: Why don't you listen to the question.

Q At the time you wrote the memorandum, was it your view that the question that Devlin probably asked Arbib was, "Whom do you consider liars?"

A Would you repeat the last part of that?

(Question read.)

A The memo suggests I was speculating on a conversation I had not heard.

Q When you wrote that paragraph did you think it was accurate?

A Specualtion is an attempt to probe.

Q Mr. Clement, did you give a deposition in this case?

A Yes.

Q That was taken under oath?

A Yes.

Q Let me read to you page 131 of the deposition and see if that helps your recollection, line 18:

"Q When you wrote this paragraph did you think it was accurate?

"A When I wrote it I absolutely thought it was accurate.

B3 "Q Do you think your recollection today is more accurate than it than it was in August of 1972?

"A My recollection today is not clearer."

My question to you is, does that refresh your recollection?

A You have refreshed my recollection of my comment to the original question, yes.

Q And have I refreshed your recollection enough that you can now tell us that when you wrote what I have just read to you you thought it was accurate?

A Yes.

MR. ABRAMS: I have no further questions.

THE COURT: Mr. Rothwell?

CROSS-EXAMINATION

BY MR. ROTHWELL:

Q Do you have up there, Mr. Clement, Exhibit D?

A I have it.

Q You have that? You have said, I believe, that you gave this in manuscript form to Mr. Arbib when he came to you?

A Correct.

Q To help him answer questions he was getting from Devlin about this Foreward?

A That is correct.

Q I would like to run through a few items. I think my page numbers on my copy are the same as yours.

Would you turn to page 464?

A Yes.

Q Would you go down to the third line and read that sentence starting with the word "Except"?

A The third line of what paragraph?

Q The third line on page 464. I will read it to you. That may be easier:

"Except for the handful of incompetent or dishonest defenses of DDT outlined in this article, however, the principal roadblock to eliminating the contamination of DDT use is now two-fold: first, a narrow positivism exists which focuses on imminent hazards to man and discounts wildlife losses as minor or irrelevant; and, second, we tend to believe ourselves so dependent on DDT in agriculture and public health that wildlife losses are labeled a necessary price for the production and protection we value more."

Now, going to the first clause, "Except for the handful of incompetent or dishonest defenses of DDT outlined in this article," whom did you have in mind when you used this language?

A The group of individuals involved in this controversy, but if you want -- shall I continue?

Q Yes, I want you to tell me the names.

A You are particularly interested in whom I had in mind when I specified dishonest?

Q Yes.

A The answer to that is Mr. Donald Spencer, who had, as you will see by reading elsewhere in this article --

THE COURT: Wait. You were not asked that. You were merely asked who.

THE WITNESS: Donald Spencer.

Q Whom did you consider incompetent?

A All of the people involved, including the plaintiffs.

(Continued on next page.)

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Q And you say this is the thing you gave to Mr. Arbib to help him in his work with Mr. Devlin?

A Yes.

Q And going to the first page, on page 445, the second paragraph reads -- strike and correct -- the first paragraph reads:

"A recent article in Environmental Affairs purports to evaluate the evidence in what is alleged to be an intensive campaign to ban the insecticide DDT from use, manufacture in and export from the United States in the past two years, i.e., since 1969.

"Its author, Thomas H. Jukes, is a biochemist and presently a professor of medical physics at the University of California. He also has been the most vocal defender of the use of DDT.

"But to be helpful, any assessment of the anti-DDT reaction, articulated by Jukes, should include comparison of the very similar announcements of Robert H. White-Stevens, a former colleague of Jukes at American Cyanamid Company and now professor in the Bureau of Conservation and Environmental Science at Rutgers University; Normal E. Borlaug, 1970 Nobel Peace Price winner for his contributions to the production of high yield wheat in Mexico; J. Gordon Edwards, entymologist at San Jose College;

and Donald A. Spencer, a wild life biologist, formerly with the U. S. Department of the Interior but most recently with the U. S. Department of Agriculture, USDA and the National Agricultural Chemicals Association, NACA, and an industry trade group."

Now, the article was written about these five individuals.

A This article, yes.

Q Now, in terms of the dishonest, you limit that to Spencer?

A I do.

Q And you make the charge that Dr. Spencer is dishonest in his expression of views on this controversy?

A I accept the testimony of the Wild Life Society to that effect and so state in the article.

Q And the other four people, including the three plaintiffs in this case, you term incompetent?

A Correct.

Q Mr. Clement, I hand you Plaintiffs' No. 14, which has been introduced in evidence in this case. This was the material sent by Dr. Jukes to John Devlin of the New York Times, containing several attachments.

One of those attachments is from Clinical Toxicology, December 1969. It is called, "DDT, The Chemical of Social Change."

Had you seen this article?

A When was it published, sir?

Q December 1969.

A I am not sure that I had seen it.

Q Is it true that the article you were writing was in response to this article and that you quoted this article in your manuscript?

A No, sir.

Q All right.

Would you please look, if you will, at page 364, containing Audubon Society Christmas Bird Count Data, and 365, and I ask you again, sir, aren't you familiar with this?

A I am not familiar with this particular article.

Q I see.

A I don't read that journal.

Q I see. Let me read you one of Dr. Jukes' statements about DDT.

MR. AGOGLIA: Your Honor, I am going to object to any reading of this. I was precluded in any way from reading any of these documents.

THE COURT: It only refers to bird counts.

MR. AGOGLIA: Then I have no objection.

MR. ROTHWELL: Well, your Honor, on page 364, there appears a table comparing bird counts from 1941 to 1960.

In 1941, there were 2331 observers, and in 1960 --

THE COURT: Why don't you show the portion to the witness rather than read it, and then ask a question based upon it.

Q 8,928 observers. Is this a use of the Christmas Bird Count Data that was offensive to you?

A It is a type of use that is offensive, yes.

Q Now, can you point out specifically what is wrong with that use on that table in that exhibit?

A No.

THE WITNESS: Your Honor, I ambeing asked to analyze a complex issue and I can't do this sitting in this chair. This requires reflection, comparison of data and so on. I don't think I should be asked to do that.

THE COURT: You say you can comment on it?

THE WITNESS: I have analyzed other words of Dr. White-Stevens. I cite them in this publication of mine, but I don't think I can analyze on the stand. It would take me -- it would take too much time to review this information now.

If you have a specific question, I will be glad to answer.

Q Well, if you please, Mr. Clement. I note that in Exhibit 3, the letter that you wrote, you said, "They certainly have had time to learn from our patient explanations of their misinterpretations of our data over the several years of the DDT controversy."

A Correct.

Q This letter was written in 1972?

A Yes.

Q This was published in 1969?

A I began commenting on the misuse of these data in 1963.

Q Could you comment and point out what misuse of data appears in this table, sir?

A I cannot do that without analyzing the entire article.

Q I see.

Now, is there any data that you can point your finger to that you can bring into this courtroom and tell us that my clients have misinterpreted?

MR. AGOGLIA: I can't hear a word you are saying, counsel. I'm terribly sorry.

MR. ROTHWELL: I'm sorry. I will withdraw and rephrase the question.

Q Are you in a position to bring into this court before this jur any one specific case of misinterpretation and misuse of Christmas bird count data by these three gentlemen in the audience?

A Yes, Mr. Counselor. This article does that. It cites chapter and verse from Dr. Jukes and explains what is wrong.

MR. AGOGLIA: That is Exhibit D you are referring to for the record?

THE WITNESS: Yes, Exhibit D.

A (Continuing) That is why I wrote the article.

Q You have it up there.

A I do.

Q Suppose you take and show me in Exhibit D where you prove that there has been a misinterpretation of Christmas count data.

A Yes, on page 459 of this article, I give an example of the failure of all of these plaintiffs to understand the implications of the Dudubon Christmas Count Data when they --

Q Excuse me. I am not asking you about the controversy in reference to the interpretation. That is a matter of opinion.

I am asking you if they have misused, if they have misquoted, if they have distorted the data; have they put phony figures in the computer, in other words?

A Not phony figures, no, but they have selected information, left out other information and, therefore, distorted the evidence.

Q All right. Now, in terms of that description, where can you point out a single case that this happened?

A It would be necessary for me to review all of their publications and show you word-for-word what is wrong.

Q Well, would that amount to a conflict of points of view and opinion as to the significance of things?

A It would.

Q It would. But it would not amount to misinterpreting data, would it?

A It would do that, too.

Q I see. But it would not descend to the level of putting phony figures in the computer, if you will?

A Not at all, no.

Q And it would not descent to the level of lying, would it?

A Not necessarily.

Q I see. And parroting something they know little about, does that describe these people in your mind?

A Yes, it does.

Q I see. I show Plaintiffs' Exhibit 29 admitted into evidence in this case, and ask you to read for the jury, please, Item No. 2.

A This is a memo I wrote to our own staff on August 14th, and Item No. 2 reads:

"Arbib did not accuse any particular individuals of lying, though he did say that those who misused our data were either being paid to lie or parroting something he knows little about."

Q Is that the full --

A That is Item 2 in full, I believe, or, no, maybe you have boxed it there.

Do you want the rest of it?

Q Yes.

A All right. There were two boxes, I'm sorry:

"He did, by interview with Devlin, identify White-Stevens, Jukes, Borlaug, and Edwards as notorious misusers of our data and implicitly either paranoiac, incompetent or intellectually dishonest."

That is Item 2.

Q Do you today from this witness stand identify the plaintiffs in this action as notorious misusers of our data?

A Yes, sir.

Q We have covered that.

Do you characterize them as paranoiac?

A That is a clinical distinction I have been told I should not make.

Q How about incompetent?

A I do.

Q Do you characterize them as being intellectually dishonest?

A Not these particular plaintiffs, no.

Q Were you talking about other people in this memorandum except these plaintiffs?

A I was talking also of Dr. Borlaug and Mr. Spencer.

Q Oh, and they are the two that are intellectually dishonest?

A Mr. Spencer has been accused of being that.

THE COURT: No, the question is, do you accuse him of that?

THE WITNESS: I have said, your Honor, that I accept the testimony of the Wild Life Society to this effect.

THE COURT: Do you accuse him?

THE WITNESS: Do I accuse him?

THE COURT: Yes. If you accept the testimony of the Wild Life Society, that means you accept that as true and therefore, you accuse him?

THE WITNESS: I would, yes.

MR. ROTHWELL: No further questions.

THE COURT: On your direct-examination, Mr. Clement, I think I quote or or paraphrase you correctly when I say that you knew Devlin and put trust and confidence in him, is that correct?

THE WITNESS: Correct.

THE COURT: In this exhibit, Times review written on August 15th, you write:

"The crux of this is that people like Devlin are irresponsible and should be avoided." Which is true?

THE WITNESS: This was an over-reaction, your Honor, because I had felt betrayed, and so, although I had trusted Devlin,now I was very upset by the results of this publication.

THE COURT: You mean it is the publication that made you change?

THE WITNESS: Yes.

THE COURT: All right, you may step down.

Next witness.

MR. AGOGLIA: Your Honor, could I move this back, please.

(Witness excused)

MR. ROTHWELL: Your Honor, before this witness testifies, may we have a side bar conference momentarily?

(At the side bar)

MR. ROTHWELL: Your Honor, in connection with the pretrial motion in this case, and pursuant to the request, the specific request of the New York Times, the parties exchanged lists of their expert witnesses, their background and a statement as to the matters with respect to which they were expected to testify.

Now, this, your Honor, the last paragraph thereof, is the submission in reference to this witness, who is Dr. Charles Wurster, the last parzgraph of that letter.

THE COURT: Yes.

MR. ROTHWELL: Your Honor, they have listed him in the pretrial order as an expert witness and the two subjects have already been -- the first subject, environmental background, general background of environmental controversy has been ruled out of this case.

The second subject is an attack on the characters.

THE COURT: He can testify.

MR. ROTHWELL: They had disclaimed that.

MR. AGOGLIA: I will tell your Honor I am not going to do that.

THE COURT: Wait a minute.

Go ahead.

MR. ROTHWELL: I object to any testimony from this witness on the merits of the case as he came in here as an expert witness. I object to any testimony to the extent that he would adduce further --

THE COURT: Let's have an offer of proof. What is the name of this witness?

MR. AGOGLIA: Dr. Wurster.

THE COURT: What is he going to testify to?

MR. AGOGLIA: The plaintiffs are very competent in their field of expertise but when they discuss the effects of DDT, bird population, using bird figures, they are outside the scope of their expertise.

I further intend to offer the testimony of this witness to establish, if your Honor please, certain claims made by Mr. Yannacone; he was privy to the Environmental Defense Fund hearings; generally to give his background, his studies in the field and his opinion as to whether or not he can draw scientific conclusions from bird count studies and whether a reputable scientist in this field can do that.

I further represent to the Court that this man would in no way or under any circumstances attach the characters of these plaintiffs; as a matter of fact, he will testify particularly that Dr. Jukes is highly competent in this field.

That would be the substance of his testimony.

THE COURT: Well, I think he can testify after you qualify him as an expert on his opinion as to whether you can draw accurate conclusions from bird count data, period.

MR. AGOGLIA: I want to also establish, if I may -- I don't want to speak too loud -- that his opinion -- that you can only draw such conclusions of the effect of DDT on bird population by doing actual research which this man did a tremendous amount of.

THE COURT: I won't put that in. Let him testify as to bird count and accuracies of bird counts.

MR. AGOGLIA: That is what I mean.

THE COURT: That is all I will let him testify to. I am not talking about what you have to do. I will let him testify that these bird counts are not accurate or valid for this purpose, period.

As to Yannacone, he is going to have to testify that he was actually in the room.

MR. AGOGLIA: He was there for every meeting; he is one of the founders and still an active member.

THE COURT: What is your objection to that?

MR. ROTHWELL: We took the deposition of Yannacone for this very purpose. They were there for this very purpose. This was months ago.

If we are going to go into a computation where they put on a witness to attack Yannacone, do we have to put a witness on to attack him? This is collateral.

THE COURT: This is not collateral. The issue in this case is malice and libel.

Yannacone said he did. This witness says he was there and he didn't. A perfect answer.

He is not bound by Yannacone's statement.

MR. ROTHWELL: No, no.

(In open court)

CHARLES F. WURSTER, called as a witness by Defendant Audubon, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. AGOGLIA:

Q Dr. Wurster, I am going to try to speed this up, if I can. If I go too quickly, stope me but I am going to try to move along. We are running a little slow.

Sir, would you tell us a little bit about your educational background?

A I went for four years to Haverford College near Philadelphia, where I got a Bachelor of Science Degree, I went two years to the University of Delaware, where I got a Master's Degree in organic chemistry, and three years then to Stanford University, where I got my doctorate in organic chemistry.

Q And from that time to the present time, if you will capsulize it for us, please, and tell us what has been the field of your activity or professional activity or endeavors.

A I spent one year on a Fulbright Fellowship in Austria, then went to work for Monsanto Research Corporation for three years until 1962.

In 1962, I took a post doctoral Fellowship at Dartmouth College in the field of biochemistry. It was at Dartmouth that I first became involved with the DDT issue and with effects of DDT on bird population. And I have been continuously involved with that issue since then.

In 1965, I came to the State University of New York at Stony Brook and I have been there since then, and I am now Associate Professor of Environmental Science in the Marine Sciences Research Center at Stony Brook.

Q Have you done independent research in the field of effects of DDT on bird life?

A Yes.

Q I want to ask you a question, sir:

Would you concede that the three plaintiffs in this case within their field of expertise, that is, in entomology or medical biology or agronomy, are skilled men in those particular fields, no question about that; would you agree with that, sir?

A Yes, sir.

(Continued on next page)

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Q And would you agree, however, sir, that the field we are discussing, that is, the effect of DDT on birdlife, is outside the scope of their particular expertise?

A Yes, it is.

Q Would you explain your answer.

A Thse people have been involved in studies on the effects of DDT on different organisms, including birds, and they are not ornithologists --

MR. ROTHWELL: I object to this line.

THE COURT: You have already objected and it is on the record.

Q I am asking you this question -- forgive me for being abrupt -- would you sit back and relax --

Do you have an opinion based upon a reasonable degree of scientific certainty as to whether or not any expert or any scientist can give a valid opinion as to the effects of DDT on wildlife in this country from bird count statistics?

A It depends upon what kind of bird count statistics you are talking about.

Q About the Audubon Bird Count statistics that are done at the Christmas Centers study?

A No. I think for this purpose they are worthless.

Q Can you tell us the reason or reasons for your opinion?

A To evaluate bird population one must make comparison with control areas. You must make counts of birds when they are on territory. For example, with the Osprey which is in issue here, you can't count Ospreys at one point with a species that is widespread over the entire continent. You would need to count them during their nesting season, when they are on territory, when you can pin down the individuals and follow the population, and that is just not possible from the Hawk Mountain data or the Christmas Count data of National Audubon.

Q Do you have an opinion based upon a reasonable degree of scientific certainty as to whether or not DDT has had a deleterious effect on wildlife in this country?

A Yes, I do.

MR. ROTHWELL: I object.

THE COURT: Sustained.

Q Do you have an opinion based upon a reasonable degree of scientific certainty as to whether or not DDT has had a deleterious effect upon the bird population in the United States from the years '62 to '72?

MR. ROTHWELL: Objection.

THE COURT: Overruled.

A Which bird population?

Q Any bird population that we have discussed in this courtroom which you have heard?

A Yes, I do.

Q Would you tell us what your opinion is, please?

A I am bothered by your date 1962.

Q I just took an arbitrary date. Do you want to go before that?

A I think you would have to go back.

Q To when, sir?

A To slightly after the war.

Q If you take the years 1946 to 1972, could you give us an opinion?

A Yes.

Q Would you be good enough to do that for us?

A Shortly after the war DDT was introduced into the world environment on a very large scale. It caused the population of a number of species of carniverous birds, including several birds of prey, such as the Osprey and the Bald Eagle and the Peregrine Falcon to decline precipitously, and in some cases to virtual extinction, the Peregrine Falcon entirely to extinction in the Eastern United States.

Since DDT was discontinued in 1972 there has been recovery of those species. The direct cause we now know to be the so-called thin egg shell phenomenon, where the metabolism light of DDT, known as "DDE"caused the birds to have fine thin-shelled eggs, and the eggs broke prematurely in the next when the birds would incubate them, and this, of coure, leads to no chicks. This is the explanation for this effect. Thin shells have been observed in something like the order of 35 species in North America, of which about 5 to 10 have had population declines that are serious. This has nothing to do with the population of such birds as Robins, Red-Wing Blackbirds, or other common species. They are not involved in this matter at all.

Q Do you have an opinion based upon a reasonable degree of scientific certainty that you can give a valid scientific opinion as to cause and effect of DDT upon bird counts or bird population, viewing Robins in a particular locale in the United States for a limited period of time?

A Phrased the way you have said it, yes. In fact, that is exactly what I was involved in at Dartmouth College. There was a study of a sprayed area, which in this case was a one-square mile area, where the population of birds in that area were compared with unsprayed areas, and it was done during the nesting season, when the birds are on territory and don't circulate around, so that even though the sprayed area and the unsprayed area were only about one mile apart, there was no mixing of these populations, because birds of these species stay within a few hundred yards of the nest at all times during the nesting season.

Q Would you call that a control study?

A Yes.

Q Could you make any kind of a valid scientific conclusion, sir, from a viewing of a particular tree and the number of Robins or the particular number of Robins that had nested in that season in that particular tree?

A I heard Mr. Marvin testify as to that yesterday.

Q Would you be good enough to comment on it?

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A It has no scientific validity whatsoever. It is nonsense.

Q Just give us the basis for your conclusion that it has no scientific validity.

A Well, for one thing, his observations on Robins were done during the migration season, during winter, when they are not nesting and they are not on territory, so they are flying around covering large areas. And, in any event, he just looked out the window subjectively in his backyard. He did not make counts. He had no controlled area. It is just foolish; it is ridiculous, frankly.

Q I ask you this: Were you ever connected with the Environmental Defense Fund about which Mr. Yannacone spoke yesterday?

A Yes, sir.

Q Could you tell his Honor and the members of the jury when you first became connected with it?

A I was one of the original trustees of the Environmental Defense Fund, which was incorporated in the fall of 1967.

Q Are you still connected with it, sir?

A I am still a trustee.

Q Now, certain statements were made in the use of the word by Mr. Yannacone of silencing someone. Could you, sir, tell have you ever heard those words used at any of the executive meetings you attended of the Environmental Defense Fund?

Let me withdraw that for a moment. Forgive me.

Did the Environmental Defense Fund have executive meetings during the years 1967, 1968, 1969?

A Beginning 1967, yes, it did. Most of the trustees met at meetings weekly.

Q Can you tell his Honor and the members of the jury to what degree of frequency did you attend these meetings?

A I attended to my knowledge all of them. If I missed any, I don't recall that I did.

Q And so what was the purpose of the Environmental Defense Fund?

A The central function of the Environmental Defense Fund was to have scientific evidence heard, that is, to bring it before the courts or agencies, so that information relevant to the environment could be heard by those bodies and become part of their decision-making process.

Q Was Mr. Clement connected with the Environmental Defense Fund during the year 1967-1968?

A No, officially he was not. He was not a trustee.

Q Do you know when he first became a trustee of the organization?

A I think it was about 1969.

Q Certainly, the first two years he was not?

A Yes.

Q At the meetings, when you were there, was a gentleman named Mr. Yannacone present?

A Yes, he was the attorney for the group during that time.

Q May I ask, sir, was he a rather competent member of your association? Would that be a fair statement of Mr. Yannacone in his field of law?

A Yes.

Q Now, may I ask you this, sir: Did you ever hear Mr. Clement at any meetings, any of the Board meetings, whether he was invited there or otherwise, ever use the words "silence someone," or did you ever hear Mr. Yannacone use those words?

A Mr. Clement did not attend most of those meetings. I don't recall that he attended any of them which were held on Long Island which were trustee meetings. And in terms of silencing, that is the antithesis of what EDF is all about. EDF's role is to have scientific information heard, not silenced. EDF's legal actions were designed to create a forum in which scientists could testify, and that was done in a number of cases connected with the DDT issue. It was done in Michigan, it was done in Wisconsin, and it was done before federal agencies in Washington, and as a result of EDF litigation and these hearings, it ultimately led to the ban on DDT in 1972.

Q Did you ever hear Mr. Clement in the presence of Mr. Yannacone or in your presence use the word "smear" in connection with anyone?

A No, that was not, as I said, what EDF is about.

Q Did you ever hear anyone connected with EDF use the words "smear"?

A No.

Q And if anyone said, sir, that someone had used that word at an executive Board meeting, would you comment on that in your judgment of the veracity of that statement?

A It is just not correct.

Q Now, sir, there was some talk here about inducing scientists to take a position. You were not here yesterday when Mr. Yannacone testified?

A No.

Q Would you explain how EDF functioned after you gave us the purpose of it? What was its aim, its objective? How did it go about?

THE COURT: You are going far afield.

Q Have you written, sir, numerous papers on the subject matter about which we are talking about the effect of DDT on the bird population, the wildlife population of this country?

A Bird population or wildlife population?

Q Both.

A Both?

Q Yes. About how many have you written on this subject?

A I think it is about 50.

Q Have you done any independent research yourself on the effects of DDT on birdlife or bird population, and, more particularly, thin shell eggs?

A Yes.

Q Tell us just generally what you did and I will done. We are just concerned with birdlife population. Tell us what you did and the ultimate outcome.

A I was part of a number of scientists in several parts of the world working on the question of what it was that caused these birds to have some problems with their calcium metabolism, and it was not clear at that point that it was thin shell eggs, but there was something wrong with the calcium metabolism.

THE COURT: Did all this occur before 1972?

THE WITNESS: Oh, yes. My hypothesis was that DDT was a liver enzyme inducer, and that the disturbed calcium metabolism leading to thin shell eggs had something to do with it, and my hypothesis turned out to be wrong. B3 The explanation is that this occurred because of an enzyme inhibition in the shell gland of the overduct and was independently found or explained by correctly by Dr. David Peakall of Cornell and Dr. Joel Bitman of the United States Department of Agriculture, and both of them came forth with their correct analysis of the situation simultaneously.

In fact, the papers were both sent to me for review, and I recommended that they be published together, side by side, in Science, and they were.

MR. AGOGLIA: You may inquire.

THE FORELADY: May I approach the bench, please?

THE COURT: Yes. The rest of the jury is excused for lunch. Return at 2:00 o'clock.

(At the side bar with all counsel present.)

THE FORELADY: Your Honor, the name of Dr. Peakall was brought forth into the court this morning. They speak of one side of an issue. I would want you to know again, in case it has been forgotten, that Dr. Peakall was the man I mentioned at the beginning when I was being selected. Even so, I will be objective about the entire case.

THE COURT: That is not completely irrelevant to the issue.

THE FORELADY: I just wanted to be sure.

THE COURT: I will see you at 2:00 o'clock.

(Forelady excused.)

THE COURT: What more do you have?

MR. AGOGLIA: That is the case.

THE COURT: There may be some cross-examination.

MR. AGOGLIA: I thought there was a mandate that I finish.

THE COURT: I didn't say a mandate. You were the one yesterday who told us you were going to be through by lunch.

MR. AGOGLIA: You've got to agree I really pushed it.

MR ROTHWELL: This is the last witness and then you rest after that?

MR. AGOGLIA: Yes. I told you that yesterday.

THE COURT: 2:00 o'clock.

(Luncheon recess taken.)

(Continued on next page.)

AFTERNOON SESSION

2:05 p.m.

(In open court, jury present.)

CHARLES F. WURSTER, resumed.

MR. ABRAMS: We have no questions for this witness, your Honor.

MR. ROTHWELL: No questions for this witness, your Honor.

THE COURT: You may step down.

(Witness excused)

MR. AGOGLIA: Your Honor, the defendants National Audubon Society, Roland C. Clement and Robert S. Arbib, Jr., rests.

MR. ABRAMS: The New York Times Company rests, your Honor.

THE COURT: Mr. Rothwell?

MR. ROTHWELL: I beg your pardon,your Honor?

THE COURT: The defendants Audubon Society, Arbib and Clement have rested. The defendant New York Times has rested. I now turn to you.

MR. ROTHWELL: No rebuttal, your Honor.

THE COURT: Excuse the jury, please.

(The jury left the courtroom.)

THE COURT: Motions, Mr. Agoglia.

MR. TROWBRIDGE: Your Honor, the Audubon defendants in the case, that is National Audubon Society, Inc., Roland C. Clement and Robert S. Arbib, Jr., respectfully renew at this time the motion for a directed verdict made at the end of the plaintiffs' case and I wish to state that motion is made on all of these same grounds as initially stated.

In particular, in connection with the renewal of this motion, we would like to urge upon the Court, the total absence of any evidence or suggested evidence of any sort that would tend to show any actual malice in any respect on the part of any of the Audubon defendants toward the plaintiff, J. Gordon Edwards. We separately, as a part of our motion, request a verdict dismissing his part of the complaint against the Audubon defendants.

I make the same request as to Dr. White-Stevens.

With respect to the plaintiff Jukes, having had the opportunity to review the transcript last evening of the testimony of Mr. Yannacone, we respectfully urge upon the Court that nothing in that testimony comes remotely close to any jury finding or even permitting jury consideration of whether there was actual malice on the part of any of the Audubon defendants with respect to Dr. Jukes or anyone else.

In the Goldwater case, which your Honor mentioned yesterday, the Second Circuit referred, with approval, to an instruction given by this Court to the effect -- and I am reading now from page 342 of the opinion, Second Series. They say:

"The Court below not only charged the jury but also emphasized in the charge that neither negligence or failure to investigate on the one hand, nor ill-will, bias, spite or prejudice on the other, standing alone, were sufficient to establish either a knowledge of truth or falsity of, or a reckless disregard for the truth or falsity of the materials used."

We respectfully submit that in this case, there is not any clear and convincing or any evidence at all of any of those things with respect to the charge that any of the Audubon defendants have been prompted by actual malice, as has been defined by the Supreme Court.

So we genuinely ask the Court to spare these defendants the further chilling effect on their First Amendment rights of sitting around this courtroom and waiting for a jury verdict.

There just is not enough evidence or any evidence to justify submission of this case to the jury, in our respectful view, your Honor.

THE COURT: I will reserve decision on your motion, but I have to point out that it is Mr. Arbib's testimony that he used this language calling them paid liars just for the purpose of warning scientists in this field not to misuse the Audubon bird count, and Mr. Clement, having read it and being a man in charge of fixing policy in this area, didn't object to the use of calling people paid liars, and Mr. Devlin's testimony that Mr. Arbib gave him these five names as being the five people to whom this article related is sufficient to allow this case to go to the jury.

Mr. Abrams?

MR. ABRAMS: Your Honor, the defendant New York Times Company renews its motion for a directed verdict.

THE COURT: Pardon me, I forgot something.

I am dismissing any action against the foreword appearing in the April 1972 issue of American Birds. There is absolutely no proof in this record that would show that a person reading that article would know the article referred to the three plaintiffs. I specifically hold that the publication in the New York Times on August 14th was not sufficient to furnish that lack.

You may proceed, Mr. Abrams.

MR. ABRAMS: The New York Times Company renews its motion for a directed verdict on the grounds that there is insufficient proof to go to a jury on the issue of actual malice.

It is our position that the legal test, which is well-known to the Court, of requiring clear and convincing proof of actual malice is one which simply cannot be met on these facts, on either of the two possible levels that the case may be viewed.

First, with respect to the question of whether Mr. Devlin's story was a basically accurate report of what he had been told by Mr. Arbib, we think the testimony, taken as a whole, is such as to require a conclusion that Mr. Devlin did get the story right and that,at the very least, there is no proof whatever that Mr. Devlin entertained any serious doubts that he was getting the story right.

The testimony of the plaintiff with respect to Mr. Devlin's conversations with them immediately after his conversation with Mr. Arbib confirms, at the very least, that Mr. Devlin was proceeding as if he was perfectly persuaded that he had the story correctly, and I believe what we have seen this morning in no way would lead to a different result.

I submit further that there is no proof of recklessness as defined by the Supreme Court and by the courts of this circuit, on behalf of Mr. Devlin or the Times, in printing the article after they had been furnished with the information which the plaintiffs sent. That information on review is essentially their side of the controversy, the DDT controversy.

We know of no authority, we do not believe there is authority, which wouldpermit the case to go to the jury on a clear and convincing test basis on such evidence, nor do we think that other evidence which the Court adverted to yesterday, which we have tried our best to consider in the interim, is of such quality or quantity as to permit a jury finding of recklessness.

It is, in short, our position that if we are right on what I will call the first branch of our motion, which is to say if we are right in saying that a jury may not find on this record that there is clear and convincing evidence that Mr. Devlin misrepresented what he had been told by Mr.Arbib or harbored serious doubts that that's what Mr. Arbib had told him, then we think it follows that since the information came from a respected serious source, such as the Audubon Society, and taking all the facts that have come into the case into account, that a directed verdict is proper and should be awarded.

THE COURT: I think I voiced everything I could say yesterday when we discussed your motions at the end of the plaintiffs' case. I don't think there is anything I could add to that.

I don't think I made reference yesterday to the denial by the plaintiffs that they were in the pay of anybody. I think the proof shows they were not in the pay of anybody. You could not infer from the proof that they were in the pay of anybody. I think that is a factor I did not refer to yesterday.

Adding that to everything I did refer to yesterday, I think that I will reserve decision on your motion.

If you want to add anything for the record, you may.

MR. ABRAMS: Yes. I neglected to add a response, if I may, to one observation the Court made yesterday.

The notes of Mr. Devlin which use the phrase on one page "libel" and on another page "wow," it seems to us that, properly construed in light of his testimony, they are a reflection of what Dr. Spencer said to him and not what Mr. Devlin was himself thinking. We have read everything there is in the transcript on that.

Your Honor may think that is a jury question. We think that the only correct interpretation of what he said was that what he was writing was what he was told.

THE COURT: I think the word "libel" could refer to what Mr. Devlin was told, but the "wow" is Mr. Devlin.

MR. ABRAMS: Devlin's testimony was that he wrote "wow," but --

THE COURT: When you write "wow" when you are calling a fellow a liar in a two-column headline -- we have gone over this, Mr. Abrams.

I will now rule on requests to charge.

MR. TROWBRIDGE: If your Honor please, we would like to make one request to the Court before that.

In view of your ruling which was just advised to us that the portion of the complaint containing the libel on the foreward is dismissed, we respectfully ask the Court to advise the jury that the statement your Honor made this morning during the cross-examination of Mr. Clement to the effect that the Court ruled that that foreword was libelous, per se, I think in fairness, we respectfully request that the jury be admonished to disregard that statement.

THE COURT: Of course not. This has to be used in regard to the count on the news -- the information given to the Times and on the letter that was written. They called somebody a liar. I can't erase that from anybody's mind. It is part of the proof in this case and it is admissible both on the second and third counts.

MR. TROWBRIDGE: Perhaps my recollection of the record was mistaken. I thought that was a discussion in terms of the foreward only.

One other thing, your Honor --

THE COURT: My question to Mr. Clement was, "Weren't you calling somebody a liar?"

He said, "No."

Then I read to him that this article says he is a liar. That doesn't mean that the libel is still in the lawsuit, but the evidence is in on Counts 2 and 3, or so-called libels 2 and 3.

Go ahead.

MR. TROWBRIDGE: We have all stipulated as an undisputed fact in the pretrial order that the plaintiffs are three scientists each having a Ph.D. Degree, each plaintiff has been an active participant in the public controversy relating to the use of DDT.

We would like to read that to the jury during summation.

THE COURT: No, that's not part of the suit and I will not charge the jury on that any more than I will charge the jury about the First Amendment. And the background, and what not. Goldwater says I don't have to, and I wouldn't do it anyhow.

I tell the jury what the law is. I don't give them the reason for the law.

Plaintiffs'requested jury instructions: No. 1 is denied except as charged.

No. 2 is denied because I have held them libelous, per se.

No. 3 is denied for the same reason.

No. 4 is denied for the same reason.

No. 5 is denied for the same reason.

No. 6 is denied for the same reason.

No. 7 is denied except as charged. It only goes to the question of damages.

No, 8, as I have said, I don't get into the are . of this explanation of the area of public debate, but I will deny except as charged the rest of that request.

Plaintiffs' Instruction No. 9 is denied except as charged.

No. 10 is denied except as charged.

No. 11 is denied except as charged.

No. 12 is denied except as charged.

No. 13 is denied except as charged.

No. 14 is denied except as charged.

No. 15 is denied except as charged.

I will not tell the jury it is appropriate to find nominal compensatory damages and substantial punitive damages.

I will tell them that if they find compensatory damages, they may find punitive damages under certain conditions, which I will explain to them.

New York Times requests:

No. 1 is denied.

No. 2 is denied except as charged.

No. 3 is denied.

No. 4 is denied except as charged.

No. 5 is denied except as charged.

No. 6 is denied. I found it libelous per se.

No. 7 is denied. I find it libelous per se.

No, 8 is denied except as charged.

No. 9 is denied except as charged.

No. 10 is denied except as charged.

No. 11 is denied. I only charge positives; I don't charge negatives.

No. 12 is denied.

No. 13 is denied.

The opening sentence says, "If a news article in a case such as this contains false statements because of some mistake or negligence on the part of the Times, as a matter of law, that is not enough to make it libel for the false publication."

That can be used two ways. Negligence can be considered by the jury under the Goldwater case because recklessness, as they say, is merely a higher degree of negligence.

Some mistake, there is no evidence in this case of mistake. Mr. Devlin flatly states this is what he was told. Mr. Arbib flatly states this is what he said. There is no claim on any of the evidence here from which you can draw a conclusion of mistake.

No. 14 is denied on the facts of this case.

No. 15 is denied.

No. 16 is denied except as charged.

No. 17 is denied except as charged.

No. 18 is denied, the first paragraph, except as charged, and I never give the second paragraph.

No. 19, I have to deny this. There are too many statements in this page and a quarter that I wouldn't charge, and I can't cull one out from the other, so I am denying it.

No. 20, openings denied.

"The Court instructs the jury that no damages of any kind may be supposed to be presumed to have occurred," and that's just the opposite of what the citation says.

Buckley says you can. By Buckley, I mean Buckley against Littell, 394 F. Sup. 918, Southern District of New York, 1975.

I am going to charge it, compensatory damages.

MR. AGOGLIA: Pardon me, your Honor. I didn't hear that.

THE COURT: I am going to charge the jury that you can presume compensatory damages under New York law.

No. 21 is denied on the basis of Goldwater.

No. 22 is denied.

No. 23 is denied except as charged. I do not give the first or second paragraphs. I do give a version of the third paragraph.

Defendant Audubon, Arbib and Clement's Request to Charge. You give me requests to charge here that go a page and two and a half pages, and those aren't clear and concise statements. Part of it is evidence, part of it is not.

The first one is denied except as charged.

The second one is denied, since I dismissed the claim as to libel as to the foreward.

No. 3 is denied, there is too much evidence in it.

Specifically, you want me to charge the jury that Mr. Arbib -- that if the jury finds that Mr. Arbib gave Mr.Devlin the plaintiff's name as the person referred to in the foreward and no more, then the Audubon defendants may not be charged.

That is not true and I will not charge the jury that.

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Similarly, the next paragraph which appears on the following page, which happens to be the fourth page of this request to charge, is clearly wrong. So I deny that whole request.

Request number 4: I don't know what it is requesting, but I am denying it. The purport of the request is that since the Times did not publish it, it is not libelous. That is wrong. I don't know what it means. If it does not mean that, I don't know what the request means.

Definition of libel. Denied, since I have ruled as a matter of law that the publication in the Times and the letter are libelous per se.

Number 6, part of it I grant, part of it I don't. I do not give the first full paragraph. I do give the second paragraph. I deny, except as charged, the third paragraph, and the end of the third paragraph, which appears on the following page I do not give, since I do not give negatives.

On damages, it is denied except as charged, and I say "the fact that I charge damages must not be taken as a suggestion you should find for the plaintiffs."

I do not obviously give the second paragraph, because I felt it is libelous per se. Therefore, the second paragraph is denied.

And what is called sub-paragraph B on the next page is denied, except as charged.

And the last paragraph is denied, because you don't use the clear and convincing evidence rule on the question of punitive damages; you use it only the question of liability, and that was clearly set forth in the Goldwater case.

Are you ready to proceed to sum up?

MR. AGOGLIA: Could we ask a favor of the court? Both defendants have been a little bit confused. I don't know how far I can pursue it. Reading from the Goldwater, what essentially will your Honor's charge be on the question of clear and convincing?

THE COURT: I will read it to you.

MR. AGOGLIA: That is very good of you, and I appreciate that, sir.

THE COURT: I first set forth the first three elements of the charge that must be approved by a preponderance of the evidence: The statement refers to the plaintiffs; the statement is derrogatory; the statement is false. If you find that a plaintiff has sustained the burden of proof as to these three elements, you must further find that such plaintiff has proven by clear and convincing evidence that the statements were published with actual malice.

The next paragraph deals with the definition of a fair preponderance.

The next paragraph reads as follows:

"As to the fourth element, actual malice, I have said that the plaintiffs must establish this by clear and convincing evidence. This means that you must be convinced not only that the greater weight of the evidence points to the existence of actual malice, but that such evidence is clear and convincing in its probative effect."

I then further speak about the fourth element as follows:

"Actual malice has nothing to do with ill will or malice, as these words are commonly used. They are words of art in this libel action. They mean that if publication was made, either with actual knowledge at the time of publication that it was false, or with reckless disregard of whether it was false or not. By reckless disregard of the truth is meant the making of a false statement when a defendant entertains serious doubts as to the truth of the publication. To find reckless disregard of the truth or falsity of the statements, you must consider all the evidence in this case bearing on the intent and motives of the defendants, the investigations made or not made to ascertain the truth, although lack of investigation alone is not sufficient to sustain recovery by or for a plaintiff. You may consider the lack of the pressing nature of the material, since the news articles was not 'hot news,' and there was ample time to investigate."

I take that from the Goldwater case.

MR. AGOGLIA: Thank you very much.

MR. ABRAMS: Could I ask one question? Does your Honor intend to comment on the evidence?

THE COURT: No, I do not. I'll leave that for your summations. I will tell the jury it has been a short time, that they listened attentively to the evidence, they heard your summations and the outline of the evidence on which you think they should rely, and that there is nothing more I can tell them about the evidence. The only time I comment on the evidence is in intricate conspiracy cases, where you have to run a thread through for the benefit of the jury.

MR. ROTHWELL: Your Honor, may I mention in my closing statement the issues as defined by the court, minus the first one on the opening day of trial?

THE COURT: No, you just argue the evidence to them, as to what it shows. I will charge them as to the law.

Do you want a few minutes before you start?

MR. ABRAMS: All I need is enough time to move some things over. It will be less than five minutes.

THE COURT: You can have five minutes.

(Recess.)

(Jury in box.)

B2 THE COURT: You may proceed.

MR. ABRAMS: Ladies and gentlemen of the jury, I am Floyd Abrams; I represent the New York Times.

We now come to that part of the case when each of the lawyers sums up to you and expresses to you his views on why he should win his case. First of all, on behalf of all of us, I want to thank you for your attentiveness. Secondly, I want to ask one thing of you, if I may. I go first here, and I don't get a chance to speak again. In addition, I ask you to do your best to bear in mind whatever I have to say that you think worth listening to, and I will ask you if I should forget something or not have mentioned something which one of my opponents mentions during his summation to you, do your best to think of what the testimony was with respect to that particular issue. You are free, of course, to read the record, and, of course, I urge you very strongly to please take the statements which have been placed in evidence here.

Now, when did this case begin? It did not begin, as Mr. Rothwell told you more than once, on August 14, 1972, with the New York Times article; it started with an overheated, over-excited and extraordinarily vehement debate between people, some of whom you have seen testify here in the last few days. On the one side in the dispute, or, at least, involved, is the Audubon Society and a variety of its allies that have taken strong positions with respect to DDT generally and with respect to the relationship of DDT on the bird population and on its effect on the Christmas bird count of the Audubon Society.

On the other side, there are other people who also hold views very strongly. Three of them brought this suit, the plaintiff scientists who have come to this courtroom today. I can hardly give you better examples of the intensity which is the background of this debate than to recall to your minds Dr. White-Stevens, when I asked him did he believe that the people who were against sending DDT abroad were advocating genocide, the deliberate killing of millions of people, here said, "yes." And I need not go beyond Mr. Clement's testimony this morning to give you an idea of the intensity with which people on the other side held to their views, Mr. Clement's testimony that in his view they had given out their information that was false and misleading, a distortion of the facts for the most self-serving reasons.

And there was much, much more, which I need not get into now, because in my mind that is not what this case is about insofar as the New York Times is concerned. It is only the background to which I will urge you to view the case.

The other background that I think you have to start with is the bird count, the Christmas bird count. There has been much testimony as to that. I have not participated in examination with respect to it, because, again, it does not affect the Times as such, but it is, of course, impossible to understand what the case is about without focusing on what the witnesses have said about the Christmas bird count.

Now that you have heard all the evidence and now that I have heard all the evidence, I think I can fairly say that the different sides on the bird count controversy are the following: Apparently, although the Audubon Society and its allies were saying very strongly that the use of DDT, was really harmful to bird life in America, their bird count study showed a continuing increase in birds, and the people on the other side of the

DDT argument use that and argue from that fact that the amount of birds seemed to be going up, and, arguably, was going up at a time when DDT was being used, and to say, in effect, well, what is so bad about DDT? What is the proof that DDT is really harmful? DDT is not harmful, as shown by the fact that when you count the birds, when the Audubon people count the birds, the amount is not, in fact, going down.

You have heard people testify on both sides about that. I take no position whatever as to that issue, and the article that was printed took no position at all about this issue.

The case literally begins with the Forward of American Birds. That precipitated the events which bring us here to court today. I urge you to read it again and again. We have all taken the better part of your time for the last few days reading it to you. Let me point out again what John Devlin saw when this caem to the New York Times and what it was that interested him.

Here is the article as such. This respected, revered, environmental, very solid, very serious, very important group was saying things like this in the Forward of American Birds, 1972:

"We are well aware that segemnts of the pesticide industry and certain paid 'scientist-spokesmen' are citing Christmas bird count totals (and other data in American Birds) as proving that the bird life of North America is thriving, and that many species are actually increasing..." and then they go on and say, "This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving of reasons."

B3 And then the Audubon Society goes farther and says what it thinks the importance of bird count is and the relationship to DDT. Then they say, "The apparent increases in numbers of species and individuals on the Christmas bird counts have in most cases, nothing to do with real population dynamics, they are the result of ever-increasing numbers of birders in the field, better access to the count areas, better knowledge where to find the birds within each area, and increasing sophistication in identification.

"With increased local coverage by the press of Christmas bird count activities, it is important that count spokesmen reiterate the simple and truthful fact that what we are seeing is the result of not more birds, but more birders. Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."

Mr. Devlin read this. Mr. Devlin is a reporter. He has been on the Times for 25 years, and for the last 10 or 12 years has specialized in nature stories; he has reported about zoos, about the oceans, about such things as DDT, and this is his story. This is a very interesting story. Mr. Devlin tells you why. Here is a responsible organization, the National Audubon Society, accusing responsible people, and these are scientists of very serious things. Mr. Devlin took it and he read it and he marked it up. You saw him on the witness stand witn the book in front of him. He started to function on it, function on it as a journalist would. What did he do? He called up Mr. Arbib, whose name is at the bottom of the article. You will see it is signed by Mr. Arbib, whom you saw yesterday and today.

According to Mr. Arbib -- and this goes now to the record, the testimony that he gave, Mr. Devlin said, "Who are the liars? Whom are you talking about?" And according to Mr. Devlin in his somewhat more general fashion, he asked who were the gentlemen who Mr. Arbib was referring to. But the question is the same. I think now that you have heard Mr. Clement today you can draw your own conclusion from that Mr. Clement had to say and did not have to say. It is perfectly clear that the question before the house, the question Mr. Devlin was asking can either be put in one or two ways, "And tell me who they are?" That is the story. Mr. Devlin gave you the reason that he gave Mr. Arbib. He said, in effect, "First of all, you have made some serious charge here and there are a lot of people in the chemical industry, at least, to whom these charges cannot apply. It is not fair to say these extraordinarily tough things without telling the names."

And, second, he said, it was a good story. And so he asked him. What happened next? Mr. Rothwell referred to it in his opening to you a few days ago. Mr. Devlin, the good journalist that he was, pursued the matter. He called again. The first time he called he did not get names from Mr. Arbib. There's a controversy here, of absolutely no import at all, and I hesitate even to call it a controversy, as to how many phone calls there were.

Arbib came back a while later, one, two or three phone calls, and this has nothing to do with the critical issue in this case which I am going to come to in a moment. What is clear, and for this purpose I want to take Mr. Arbib's position, Mr. Arbib said three phone calls. Take it as three phone calls. And then Mr. Arbib on that third phone call gave him names.

The first and obviously critical question in the case, what did he say when he gave the names? Mr. Devlin has told you in substance that he gave him the names: Here are the people. Mr. Arbib told you that he qualified it, qualified it strongly and in an important way, that what he said in substance was, "I am not saying these people are liars; I want to back away from that. I just want to give you names of people who are either mis-users of our data..." or some other phrase like that.

How do you decide a question like that? How can you decide whose recollection is correct, or if you think someone is not telling the truth? It is four years ago. It is a long time. It is a long time for all the witnesses, whatever side they testify for and whatever they testify about. I would tell you, I would urge you, if there was nothing else, that I would say that Mr. Devlin is an honorable, honest man, and I ask you to take it on that basis, listen to Mr. Devlin, listen to Mr. Arbib, and make up your minds as to who is telling you the truth or whose recollection is better as to those events.

But I think we can do better than that. We have evidence, we have writings, thank Heaven, that we can show you, which indicates what was said, what it was that Mr.

Arbib said to Mr. Devlin. What are those records? What was it that Mr. Arbib said to Mr. Devlin? What are those records?

The first is Plaintiff's Exhibit 3, the Audubon Society letter that it wrote to the New York Times. Here is the letter, August 14, 1972. It is written the afternoon of the Times article. Look at it. The only thing that is relevant, the only thing that is relevant at all in this article bears upon this question, Mr. Clement's signing for Mr. Arbib, saying, "Nor do we like to call people liars," and then he goes on, "but those who have most consistently misused our data..." and he gives the names ..."certainly have had time to learn in our patient explanations of their misinterpretations of our data over the several years of the DDT controversy." That is not the way you speak English if you are saying, "We have not called B4 them liars; the story is not true. They are not paid liars. You missed the whole point."

I don't have to run through all the different ways this could have been phrased, that is, I don't want to place myself as an English teacher. That is not the way someone writes a letter if someone gets the New York Times. It is not the way to say, "These people are not liars."

I asked Mr. Clement, "Did you do anything else or write anything else to say in any way that the Times story was not right, that the Times made a mistake?" And the answer was no. This is it. This was the position of the Audubon Society when the Times article came out. I would urge upon you this is nothing but a confirmation of what the Times article said Audubon was saying. There is no other way to read this language, and that is, in fact, what the language means.

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What about that Arbib-Clement telephone call. You heard about that this morning. There is Mr. Arbib out in North Dakota, can't hear too well, he says. Clement calls him up on the telephone, reads to him the New York Times article, and he reads to him this letter.

Mr. Clement testified for you that he heard -- I'm sorry, Mr. Arbib testified that he heard this paragraph at least read to him, and, nothing.

Mr. Arbib didn't say, "Look, I didn't call them liars." He doesn't say, "Change that language." He doesn't say, "Look, we have to say something to the New York Times or to these plaintiffs to tell them that I didn't call them liars. In fact, I said the opposite. I said, I wasn't calling them liars."

But he said nothing. There is silence, and this is all, except for one thing, and that is the Audubon document that you have before you, which I urge you to read, Times Exhibit UU.

It is an exhibit that I questioned Mr. Clement about this morning in that incredibly long exchange with Mr. Clement, in which I was trying to get him to say what he finally said, which is that when he wrote this memorandum on the 15th of August, the day after the Times article, the day after the Audubon letter of August 14th, and the day after he spoke to Mr. Arbib on the telephone from North Dakota to New York, that Mr. Clement wrote and believed the following:

"Devlin probably asked whom do you consider liars, and Arbib was trapped into listing people I have never called liars, though they may be."

I put it to you that that is not the language people use if the fact of the matter is that Arbib said on the phone to Devlin, "I am not calling them liars, they aren't liars. They are simple, whatever, misuses of our data."

There is still more, and more testimony that you heard this morning from Mr. Clement.

Mr. Clement is prepared to say and told you this morning that at least this line, this quite obviously is false and misleading, a distortion of the facts for the most self-serving reasons, at least that line does apply to the plaintiffs in this case and that at least the second part of this line does apply to the plaintiffs in this case, or is parroting something he knows little about. That is what Mr. Clement says now four years after the event.

So I put it to you that when you retire to the jury room and you try to decide what happened, what did Mr. Arbib and Mr. Clement have to say to each other, specifically did Mr. Arbib or did he not say to Mr. Clement -- I'm sorry, did Mr. Arbib say to John Devlin of the Times, "We are not calling them liars," that when you bear in mind all that evidence and you bear in mind the letter written by Audubon the same day, when you bear in mind the telephone call, the no reference to liars in that fashion, when you bear in mind the internal memorandum of Audubon written the next day -- and I will add, when you bear in mind what I hope you willagree with me is the basic trustworthiness of John Devlin as a witness -- that you will conclude that Devlin got it right, that he got the story right, and that what he was being told was, "Here are the names," and that what he was not being told is, "Here are some names but these names have nothing to do with this foreword or these names are not people we are talking about in the foreword."

I suppose the next step is what did Devlin do. He had spoken to Arbib. Arbib, I tell you, I urge on you, Arbib had said, "Here are names." What did Devlin do? He started calling around.

Let me pause a minute before I get to his calls to scientists, two of whom are in this courtroom, to raise with you another possibility about what I have just said.

I told you so far that on all the evidence that you have got, we urge you to conclude that Devlin got the story right in that he correctly understood what Arbib was saying and that his testimony to you is in all respects correct.

Suppose there was some failure of communication. Suppose Arbib used some word, I don't know what it is, which meant to convey to Devlin the idea that these weren't liars. I don't think that happened. I have to tell you that.

But if there is any confusion, if there is any confusion, if there is the kind of confusion which sometimes does happen with people on the telephone who are busy people doing busy things, then what I am going to tell you or argue to you in a few minutes is that at the very least, that if those are the facts, your result ought to be the same, because Mr. Devlin had no doubts, no doubts at all, that what he was saying was accurate.

You will hear about the law from the Judge in this case, and I am not going to presume to try to tell you wh t the law is, but certainly two more things that you will be focusing on are, one, did Devlin knowingly do anything wrong, did he know he was printing something that wasn't so, and I argue to you that that is not so; and the second is, if anything went wrong, if there was some failure, did he print what he did with any doubts that that's what he had been told?

I would argue to you that there is no basis for concluding at all that he had any doubts. Indeed, what is the testimony? You heard Dr. White-Stevens testify and you heard Dr. Jukes testify. What did they testify about?

At the beginning, at least, they testified about their conversations with Mr. Devlin on the phone. Both of them confirmed exactly that what Devlin was doing was calling up right away, after he read this, after he spoke to Arbib, he was reading the names, passages from the foreword, which I have read to you, and he was saying, in substance, "Let me read it to you."

Dr. White-Stevens told him that the scientists that were unnamed in the article to which Mr. Arbib was referring were himself and four other scientists, two of whom are also in court today.

Similarly, Dr. Jukes testified -- I am reading to you what he said from the stand a few days ago -- Dr. Jukes said Mr. Devlin had said to him that Arbib had said that the five individuals named in the Times article "were paid liars on behalf of the chemical industry."

That confirms, at the very least, that from the moment Devlin spoke to Arbib, he proceeded on the understanding that what Arbib had said to him was "These are the people," whether he used the phrase "paid liars" or not, these are the people who are paid liars, or these are the scientists who are the thrust of these extremely stern, harsh allegations in this foreword.

What happened next? There isn't much farther to go on the facts insofar as they relate to the New York Times.

Mr. Devlin spoke to three of the five poeple mentioned. Two of them are in court, and they said, "Mr. Devlin, these charges are unfounded. They are emotional, hysterical." Mr. Spencer at least said, "They are almost libelous."

Mr. Devlin printed that. The article is a New York Times report by John Devlin, August 14, 1972, which reports the charges made by Audubon as stated by Mr. Arbib to Mr. Devlin, and the critical part after the headline, "Pesticide Spokesmen Accused of Lying on Higher Bird Count," and in the introduction it says, "The accusation against the pesticide industry and some of its spokesmen is contained in the foreword by Robert S. Arbib."

Then it talks about the foreword. The people are not identified in the foreword:

"Mr. Arbib said in an interview that they included Robert H. White-Stevens," and the other people not in court today, and two other people.

"Not all of the men could be reached for comment but those who could ridiculed the accusations as 'emotional,' 'hysterical,' and unfounded, and Dr. Spencer said the were 'almost libelous.'"

Then the article continues with quotations from what the Audubon Society had written about these scientists. That's not all that the scientists who have appeared here have told you that they said to Mr. Devlin. I think we have reason to believe that that is not all they said to Mr. Devlin, because they sent him material. Two of them did.

Again, I urge you to read it. At least to look at it. If you read it all, it will take you a long time. One of them is Audubon Exhibit Z, letter to Mr. Devlin from Dr. White-Stevens dated August 8, 1972, which encloses a lot of information. I will tell you in a moment what kind of information.

The other is another exhibit, Defendants' Exhibit 14. It is the letter written by Dr. Jukes to Mr. Devlin which says, "Thanks for your telephone call. Enclosed are the items from the Hawk Mountain Sanctuary Newsletter Association, reporting and commenting on the increase in the osprey count."

This is what Mr. Devlin received at the New York Times. That's what they sent and that's what they said to him. I have urged you to look at it. In all seriousness, I don't urge you to look at every line of it.

What does it deal with? What doesn't it deal with? It doesn't deal with the charges against the Audubon scientists. It deals with DDT, bird counts. It sets forth elaborate and often in very technical language the position of these scientists with respect to why they are right in the DDT debate and why the other side, the Audubon -- not just Audubon, the other side, Audubon side and the side of its allies who are against DDT, are wrong.

So Mr. Devlin had this information. What did they do? He printed the story. He wrote the story and the times printed the story. He printed accurately a denial of the charges made by Audubon against the scientists and he printed accurately the charges made by Audubon against the scientists.

Of course, because it was printed, we are here today, at least I am here today.

I have said that Judge Metzner is going to instruct you on the law, and I mean that I am not going to get into the law in any way, but let me address certain of the legal questions which I think you will necessarily be faced with in deciding the questions in this case with respect to the New York Times.

The first I have already mentioned: Did Mr.

Devlin print anything which he knew he had been told was wrong? That is to say, did Mr. Arbib say to Mr. Devlin, "Look, we are not calling these people liars," and then Mr. Devlin went ahead and printed, Mr. Arbib is calling them liars.

You have to decide that question. Based on all the evidence you have heard, you can find that Mr. Devlin got the story right, he didn't get the story wrong. Did Mr. Devlin print charges that he wasn't sure had been made, that he had serious doubt about what was going on?

Again, there is nothing in this record, you haven't heard anything to indicate that there was any doubt at all in Mr. Devlin's mind as to the story, as to the accuracy of the fact that Audubon Society was saying these things.

Did Mr. Devlin act recklessly? Let's think about that for a minute. The Judge will tell you what reckless means. I put it to you first that this story, a completely accurate and important and relevant story for the public to have, that when an organization as important and prestigious as the Audubon Society makes the kind of attack that they did on these plaintiffs, that's what these papers are for, they are supposed to print things like this.

The public really ought to hear if the

Audubon Society says these kind of things. The public ought to hear the answers, and the answers are here. I am not telling you that any time any crank walks into a newspaper and says, "Look, so-and-so is a liar," the newspaper ought to print it.

I would have a lot harder case if that were the case and I were arguing that to you. This isn't a crank. This is the Audubon Society. These are people of quality and an organization of importance, that you know about, you have heard about, and that you have seen today, an organization which is taking a direct, important, critical role in its on-going public debate about DDT.

I said I spoke first, and I am pretty close to finishing what I have to say. I do have to say some things in ignorance of what my friends at this table and that side of the table are going to say, because I don't know what they are going to say to you. I wish I could go first and last.

So I will mention a few things which have been mentioned at various points throughout this case. I will tell you that I think they ought to have no bearing on your judgment. I will tell you that I think they are totally irrelevant, have nothing to do with how this case rightly ought to be decided insofar as the Times is concerned, but let me mention them.

Mention has been made to the summaries of Mr. Devlin. They are here. You can look at them. They are all here, admitted in evidence. There were three of them. One says, "For the Sunday Edition," and the other two do not. Mr. Devlin didn't remember which he wrote when.

There was, I think, at least a suggestion in one question that if you study these closely enough, that you will conclude that the Times, in an effort to sell newspapers, was making the story more exciting than it was initially written.

First of all, I have to tell you that a story like this does not exactly sell newspapers, that the bird count is of great interest to the people at this table and that table in this room and to many Americans, but this is not exactly Watergate.

Second, and more important, read them. Read the different summaries. They are not different in any significant way. They do not suggest in any way that the story was changed at all. In fact, come back to what Dr. White-Stevens and what Dr. Jukes said, in effect. They were called early on the 4th of August, Friday, the 4th of August, when this was all just breaking, they were called by Mr. Devlin and they were told then that the Audubon Society had this foreword. It was told to them then, and there is just no basis at all for thinking that Mr. Devlin changed his story or did anything to it to make it more exciting in any way.

In any event, I do urge you to read through the summaries if you think they may have some relevance to the case.

Then reference has been made to Mr. Devlin's notes, these almost illegible notes. I have to tell you, I don't think you are going to make any more head or tail of them than Mr. Devlin did when he testified. But they are here. If you think they have any possible relevance at all, I urge you to read them. At least look through them.

There was some suggestion that a very close reading of his notes indicated that Mr. Devlin had written, in talking to this Dr. Spencer, in talking to Dr. Spencer, "libel" and then "wow." You read the notes. Think back to what Mr. Devlin had to say in his testimony.

The substance of it was that what he was doing was writing down what Dr. Spencer was telling him. It wasn't Mr. Devlin who was saying "libel." Dr. Spencer was saying, "This is almost libelous," or whatever he said. There is no reason to think that it was Mr. Devlin who was saying, "wow."

Is this a "wow" kind of story anyway? Is Mr. Devlin the kind of many that thinks in terms of "wows," "gee whizzes," and things like that? I don't think so.

I have already mentioned the letters and conversations between Mr.Devlin, Dr. White-Stevens and Dr. Jukes. What do they prove? What can you make of them? They stated their position, that's true. I have no reason to doubt that for a minute, that they told him that the charges were false, unfounded, emotional, et cetera, and there is no reason to doubt that. These are things Mr. Devlin wrote and the Times printed.

Let me put the issue to you squarely. What was the Times supposed to do with this new information? There was one thing it could have done. There is one thing: It could have not printed the story. It could have said, "Dr. Jukes and Dr. White-Stevens, tell us that this is not so. We either ought to go out and investigate it on our own or we ought not to print it."

The fact is that then the New York Times becomes our censor, the New York Times becomes our great investigator. This wasn't the Times saying this. This was the Audubon Society telling you this.

I urge on you, when the Audubon Society makes charges like this against people like that, that you are well served when the Times prints it and lets you know about it.

I turn, before I conclude, to the one issue that I obviously am hesitant for you to reach. I am hesitant for the reason that it is damages, and I am arguing to you that the New York Times ought to win this case and not lose it, and that you should not award any damages because the Times didn't do anything wrong.

All I tell you about damages is to listen closely to Judge Metzner's charge. All I will urge on you as the lawyer for the Times here today is that the truth of the matter is that these plaintiffs really were not hurt, that they are continuing in their careers, in full bloom, with the respect and authority and the money that they had before.

This hot debate between the Audubon Society and its people and its allies on this issue and these scientists and their allies on this issue has gone on, and there is just no basis, I argue to you, for any kind of an award of money for what the Times did.

Let me conclude, then. I told you at the start of this case that there were more than three reputations involved here, and I think that's a fair statement to make. It is really not just the plaintiffs who are before you today. It is not just the plaintiffs who are saying, "Our reputations are at stake and we have been hurt by having these things said about us."

You have to make a decision about Mr. Devlin. He was before you. I am not going to tell you what to think or even argue it. He was before you and you saw him. He spent 25 years as a journalist with the New York Times. He spends his time at zoos and museums and writing about oceanography and about DDT. He has never been involved in a libel suit before. He got a story. It was a good story, and he wrote the story.

I would urge on you that he wrote the story well and fairly and properly, that we are all well served by that kind of journalism, and based on the facts as I outlined them to you and the law as you will hear it from the Judge today or tomorrow, that you should render a finding in favor of the New York Times.

Thank you.

THE COURT: Mr. Agoglia.

MR. AGOGLIA: Your Honor, Mr. Justice Metzner, may it please the Court, Madam Forelady, ladies and gentlemen of the jury, counsel on both sides of the table:

I don't consider counsel for the New York Times my opposition in this case. My opposition in this case, at least as defined by the Audubon Society and Mr. Arbib and Mr. Clement, are the three plaintiffs who bring suit against my clients, charging them with maliciously causing the publication of a libel in the New York Times.

We say unequivocally, without reservation, that that charge is false, it is not true, it has not been sustained in this courtroom.

We say to you, Madam and gentlemen of the jury, by way of introduction, that we have a duty to speak on all issues in this case. I am just going to spend two minutes on the issue of damages and get on to what I think is the essence of this case.

There is no doubt that if you believe this article was printed maliciously by someone -- the Judge will explain the law to you, that's not my province -- then you can consider what they call general damages, and the Judge will go into all that.

Then you can go into the question of punitive damages if you feel that is justified by the facts of this case.

All I am saying to you is that in this case, I feel very strongly that there is no element of malice in this case, acual malice, that you will hear about. It is just no part of this case. It never has been a part of this case, not from Day I or August 14th until the present date.

I want you to understand that I speak to you as intelligent people and I discuss the question of damages not because I have no confidence in your telligence and integrity. You may ask youselves, "Why is that lawyer from the Audubon Society" -- and my name is Emmet Kelly Agoglia, if you remember. Why am I speaking to you about damages? It is my duty that I owe to the organization and the men whom I represent.

I would like to now discuss the aspects of the case with you that have been discussed by counsel for the New York Times.

There is a very substantial legitimate issue in this case, at least they contend it is legitimate, that Mr. Arbib, that gentleman back there, when he was called upon by Mr. Devlin, who was trying to sell newspapers -- that's his job as a reporter, selling newspapers -- he was asked to give names.

Here is a man who they are charging with malice, and I am going to ask you to very seriously consider this, they are charging Mr. Devlin, Mr. Arbib and Mr. Clement with malice, and here is a man who, when he first calls, says, "Hold it, Mr. Devlin, I don't want to give you any names."

Does that evince a state of mind that speaks of maliciousness or ugliness or viciousness?

But Mr. Devlin, whose job it is to sell newspapers, persists to the point where Mr. Arbib goes to Mr. Clement, and that's why, yes, counsel for the New York Times, there is lots of other evidence in the case that you have not spoken about, but he went to a key exhibit in this case, or one of the key exhibits, Exhibit D, and I ask you, madam and gentlemen of this jury, to review that exhibit, and you see in this exhibit, which was the source or genesis of the names of these parties, whether or not they are called liars.

I respectfully submit that any kind of a fair reading of that document will put this whole case in perspective. The perspective of this case, I respectfully submit to you people, is that the Audubon Society not only had a right but an absolute duty to print the truth against people who are using bird counts to confuse the public. It wasn't their right to do it; I submit it was their duty.

A call is made. Mr. Arbib said, madam and gentlemen of this jury, "I never said that these men are liars."

Mr. Devlin, at least on three occasions, twice at examination before trial and once before you, said he was very reluctant for the New York Times using them, referring to the names.

Does that evince a state of mind of a man who is maliciously trying to ruin the reputation of someone? He is telling the man from the New York Times by their own admission, "Please, sir, don't use these names."

He says further, "Not only don't use them, we don't call them liars." But we do, madam and gentlemen, and we did then and we do now say very respectfully that there were people who misused the bird count statistics, and that is what the foreword said, all those who persistently or continuously misuse statistics.

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p.m.

How do we judge the accuracy of those conversations? How do we judge whether or not Mr. Devlin is accurate in reporting it or whether Mr. Arbib is accurate in reporting it? Well, let us look at the motivation of each?

What did Mr. Arbib, as the author of that original piece, Foreward, have to gain by saying these are paid liars, when, in fact, he told you very honestly he did not know anything about them until he went to Mr.Clement? Number two, if there was any malice, why would he say, "Look, fellow, don't use these names." They admit this. More important than all that, why, madam and gentlemen of the jury -- and I am going to read from the testimony of Mr. Devlin -- why did Mr. Devlin say as follows:

"Q As a matter of fact, sir, Mr. Arbib went so far as to give you the locations where you could contact these various people to get their side of the issue? Isn't that the truth, sir?

"A I had asked for that and he provided that information.

"Q And he provided it so that you could contact these men and get their side of the issue? Isn't that the truth, sir?

"A That is correct."

Is Mr. Arbib trying to portray these men or saying, "Here are five names; they are liars; go ahead and publish it and do as you please with it"? He is saying, "Look, sir, call these people on the phone; get their side of the issue."

Now, for goodness sake, what issue do you think they were talking about? Whether they were paid liars or whether they were people who are misusing the bird count? And if you want any confirmation of it, I refer you to the same exhibit that counsel did, Exhibit C --and forgive me for shouting -- Exhibit C, Madam Forelady and members of this jury, is a statement of the various articles by Dr. Robert White-Stevens, in which he says, "Look, we were not misusing the bird counts." Wasn't that the issue in this case?

Go through the technical articles very quickly and you will see that is the posture of the case. And so, the very response from Dr. White-Stevens bespeaks of the fact that Mr. Arbib did say, "Yes, these are the five men who have been misusing the material, the bird counts and the Christmas Counts." Why would he supply all this information? Just use a minute of common sense on this subject. Why would he supply all this information if the issue is these are paid liars? How, in God's name, does that refute that issue that he is or is not a paid liar? This only rebuts the issue of the bird count and whether they have taken a scientifically valid position.

Sure, there is a lot of other information to show where the truth really lies.

Take a look at the notes of the man. We know for a fact that at least by August 4, madam and members of this jury, by August 4 he was interviewing some of these plaintiffs, because one of the letters speaks of a call on Friday, August 4, and is dated August 7 or 8. And we do know that the article was not published till the 14th. We do know very significantly, and it is not to be just pushed aside, that there is the summary of August 11, the Friday before the publication, and for the first time the word "liar" is used -- and in quotes -- in those summaries. And they are significant. They are not to be just shoved aside and say, "Forget about that."

But you take a look at those notes, and you have a right to have them before you. You see if any man over that approximate time, about a week or two weeks, could make any sense about it. And The New York Times has the temerity to come before you and say what it says? Come now.

Here was a man saying, "Boy, I've got something here pretty good now and I've got a by-line I am going to sell."

For goodness sakes, just look at it in perspective. Forget about the lawsuit, the fancy lawyers that you have here -- myself excluded -- and just let me say this to you. I mean this now. Just take a look at this. A man is charged with giving the names of five people as being paid liars. He says, "Here are their names; here are the addresses; interview them; go get their side of the story."

And there is not a single thing for that man to gain, because he is not selling Foreward to The New York Times. The New York Times is selling newspapers, and when it is all said and done, how do you justify this bold two-line caption here, which was not even written by Mr. Devlin. Was that there to sell newspapers?

And they have the temerity to say, "Yes, we misconstrued." I think by any fair evaluation of the evidence in this case you must conclude that that man of dignity there, Mr. Arbib, said, "Now, look, I am reluctant to give you the names."

It took two or three calls to get them, and The New York Times' man admits, "He told me, 'Don't use them.'" He is a malicious person who gave the information and said, "Here, Mr. Devlin of The New York Times, you use these names and call them liars"? Come on! That makes no sense at all. If you are going to be a malicious, vicious individual and pick out five names from a pamphlet, and you admit you do not know about it, and you are going to call them liars, do you say, "Hold on, I don't want you to call them liars, but interview them, get their side of the story."

Is that what you would do if you were malicious? Is that what common sense would dictate or mandate? You would laugh me out of court if I took that position. These B2 people were told, "Don't use the names of these men; they are not the paid liars; they are abusers of the census." And they were abusers of the census, and we do stand by that. They did misuse our quotes to come to scientific conclusions that were not tenable. And, madam and members of this jury, the best proof is the very eloquent fact that this afternoon you heard two lawyers say, "I refuse or waive my cross-examination of the witness." It will be the first and last time in the history of this court you will see that happen, because the position of the plaintiffs scientifically is not tenable, and we did not come here to throw any mud at them or any such thing as that, and we concede without qualification in their field of expertise they are experts, no question about that, particularly Dr. Jukes has done fine work with animal vitamins.

But, when they go outside their field, like when I try to do that, or anyone else sitting here goes out of his field of expertise, for instance, if I try to be an expert on ornithology, I would be probably put down, because I am not, and they were not in their field when they took bird counts to justify the use of pesticides, they were wrong scientifically, and we had a duty to make this known to the public. That is one of the functions of the Audubon Society.

Now, I could stand up here for another hour, two hours, and rant and rave, or speak very calmly about what you should consider and what you should not consider. You have heard all the evidence in this case. All I am asking is a modicum of common sense. That is what I am asking for in this case, to arrive at the conclusion that Mr. Arbib made such a reckless statement that, "These five men are liars," and then say, "Here, go out and investigate the fact as to whether or not they are liars."

Every other fact in this case bespeaks to the contrary. I submit it would do harm and grievance to the intelligence of a fair-minded jury.

I would like to address myself just for a few more moments and I will be done, I promise you. The fact that at times during the course of a trial I can be a pest, I want you to remember one thing, and the judge will tell you, the issue in this case does not involve lawyers or personalities; they involve the Audubon Society, that gentleman, Mr. Arbib, and that gentleman, Mr. Clement, and if I was intemperate at times, that has nothing to do with the issues of this case. The issues of this case are totally beyond the lawyers in the case.

I am going to ask something else of you. There was a charge and an attempt to prove in this case, which I frankly resent very much, and I think any fair-minded juror who will recall the evidence will resent, and attempt on the part of a lawyer named Yannacone to malign Mr. Clement by saying he was trying to smear or silence the name or reputation of Dr. Jukes. I say to you, members of the jury, that is an absolutely false and unfounded charge, and I say to you very respectfully on your oath as jurymen and jurywomen in this case, for the two years that these statements were allegedly made, Mr. Clement was not even a member of that tribunal; he was a man in New York and did not attend the meetings. And you heard Dr. Wurster say that today.

Strange, not a single question, not one question was put to him as to that in any manner, shape or form, the veracity or credibility of that story. I respectfully submit to you no matter what you accept or what you believe in this case, there is just no proof in this case, not a scintilla of proof of malice on the part of these men or the Audubon Society, and that feeble attempt -- and I use the words advisedly -- by Mr. Yannacone to interject that element in the case, I trust, will be met with an intelligent appraisal, because if there were a scintilla of truth attached to it, they would have gone after Dr. Wurster, the plaintiffs would have gone after Dr. Wurster hammer and tong to try to establish that the testimony of Yannacone was truthful. It could not be truthful; he was not even a member, never attended any Board meetings until the time when Mr. Yannacone was leaving the department or leaving the organization.

And so, I ask that you consider that when you hear the judge's charge of anyone who deliberately misstates a material fact in the case, and in this case the question of actual malice is material to all sides, and his Honor will tell you who carries the burden of proof on those issues.

B3 I finally would like to conclude, if I may, by saying I don't think there is a shadow of doubt on anyone's part of the raging controversy about DDT and its effect on birdlife, and we respectfully submit to you on that issue that you will conclusively establish that the DDT people who are using bird counts to justify their position did not know what they were talking about scientifically. And, madam and members of the jury, when you think about that in light of the Foreward, I think the proof here has been most eloquent that they were mouthing things they knew nothing about, and, therefore, we had the right and we had the duty, particularly when you couple that with the statement we had made to members or bird watchers, they were telling bird watchers, "Beware, if you hear any of this business," because, you see, we had known and Mr. Arbib had told you that this was not the first time an industry had tried to pull the wool over the public's eye, they had done it in the tobacco industry and in a lot of other environmental areas, and it was the very duty of this organization through these men to point this out, not to allow, not to tolerate anyone using their bird counts and misusing the facts.

So, I say to you by way of closing, very simply this: I thank you for your attention throughout the case. I ask you to continue in this vein till you hear counsel's summation, and, importantly, the charge of the Court, and then go out and make the intellectual and moral judgment that the evidence in this case compels, a verdict in favor of the Audubon Society, these two men, Mr. Arbib and Mr. Clement. I thank you.

THE COURT: Mr. Rothwell.

MR. ROTHWELL: I think you remember I stook before you on Thursday afternoon and had my first chance to talk with you, and this is my second and final. I told you at that time, if you remember, that I had heard you listen to the judge's instructions and I reminded you as to your oath, and I said to you I believed you, and I, in turn, made a promise and an oath to you that I would prove certain things before this case was over, and now that those matters have been proved I ask you to search your recollection now and judge whether those rather startling things that I told you about on Thursday afternoon are not fully and completely established.

You have been a good and most attentive jury. I thank you for it.

Now, this is not a complex or long or difficult case, but it is a little unusual in one major respect: We have two groups of defendants, and we call them antagonist because they each have a different story. Audubon says, and just got finished telling you in very eloquent and persuasive terms, that The New York Times did it, and Mr. Abrams started out by saying that Audubon did it. And then, of course, both Mr. Abrams and Mr. Agoglia have said each in his own way that the plaintiffs were not hurt, that nothing has happend. And, of course, an inconsistent defense on the part of a defendant is not at all unusual.

We have had inconsistent defenses from each of them, that is, on the one hand each says, "We didn't do it," and on the other hand they say, "We had a right to do it." And then, of course, if anything happened, it was the other's fault. And so, if we believe in both and take their version of the facts and their interpretation of things, why, we can maybe come to the conclusion that nothing happened here. Except, that is not possible, because we know that something did happen. And that is what did happen. I will speak about damages at the conclusion of my quite brief argument.

But, I think it is rather cynical to say that just because a man does not lose his job or lose his income that he is not hurt. I will speak to that at the conclusion of running through the material that I want to review with you.

First of all, you heard Mr. Devlin. I called Mr. Devlin. You remember, I examined him. There was a reason for that. There is no need to go into it. But then the case started, as it normally would. You heard from the three plaintiffs, and as Mr. Abrams told you, there was no attempt to attack them; there was no attempt to show that they were incompetent or liars or anything of the sort, not from The New York Times, that is. Yes, he kept his promise. There was none.

There was something else, though. There is evidence in this record, and you heard it, the concessions made that these are distinguished men of a very substantial station; they are scientists and men of achievement and accomplishment. And I think that in terms of the values that we are trying to support and advance to you, that we owe them a debt of gratitude; we owe them a debt of gratitude and admiration for having the tenacity and the courage to come into this court against these formidable defendants and insist on getting some justice.

What did happen has been explained in varying versions by both of the gentlemen in their closing arguments before me. Please, in your minds don't think that the question is going to be decided altogether on which one of them is right or which one of them is wrong. Perhaps they are both right, although when you put the facts together they both can't be right. Or perhaps they are both wrong, and that is my position, they both are wrong.

I don't have time, and I am sure you don't have the patience to hear the record of this trial played over again. Here it is for the most part on these printed pages.

You have been patient; you have listened, you have followed attentively; and I am not going to presume on your patience again. Let me speak to the one issue, the presence of malice

Now, malice in this sense -- and I say this, your Honor, without presuming on the Court's function -- the Court will advise you as to the law -- malice in this sense is tantamount to a degree of recklessness.

B4 Now, as to The New York Times, the only person that we have been told that played a role in this was Mr. Devlin. Mr.Devlin was acting for The New York Times. There is no dispute about that. Now, was Mr. Devlin reckless? Mr. Agoglia has just finished making an argument that goes very strongly to that. But I would like to add a few points. In addition to the edition of the headline, as Mr. Agoglia pointed out, the headline that did not appear in the Foreward to American Birds, in addition to that, he did make an investigation. Everywhere he turned, every question he asked he was told, "This is not true as applied to me."

Dr. Stevens said that. He could not get in touch with Dr. Edwards, because Dr. Edwards was up on the top of a mountain at the time, at Glazier National Park, as he testified, checking out high altitude insect life. He did, however, talk to Dr. Thomas Jukes. This language here indicates that he was warned, he was put on notice, and it is odd, very odd, a sort of oddity in the law, this very wrong that we are complaining about, the libel, appears right here. Dr. Spencer said they were almost libelous. Almost libelous. I do not misquote. I presume, and I think the jury will be entitled to presume along with me, that he was talking about the language in the Foreward to American Birds.

So Devlin, according to the Audubon story, was warned to start with by Mr. Arbib. Do you believe that? You can believe that or you cannot believe that. That is your province. But even if you don't believe it, what else is there to show recklessness, improper conduct on the part of Mr. Devlin? We don't attack him personally. I do wish his memory could have been a little better. But you take things as they are.

But, was there anything else? Yes, there was, and it came out later, and I believe you all made the proper connection when we brought that evidence out, and that is that two of the three individuals in the courtroom who are plaintiffs here, each of them put together a package of material. Here is Dr. White-Stevens' package. You take it into the jury room; here is Dr. Jukes' package. You are going to take that into the jury room. All about this subject

And even a cursory reading, not total understanding reading, but a cursory reading of this would put up a strong reading that we are in a highly controvertial area --Wow! Be careful!

So the word "libel" was used, according to Mr. Devlin's article, according to the testimony of Dr. White-Stevens, used to Mr. Devlin, warning him, and, in addition, he had material. You will find a postmark on this that it was sent respectively on August 7 for this small package and August 8 for this large package.

Now, without making any comments about the postal service, the matter on the 7 came from California, the matter on the 8 came up to New York from Rutgers University. Mr. Devlin, as you remember, when he testified, could not remember when he received it, and then he did say, "Well, yes, I guess I looked it over, but it was pretty technical."

Now, that expression of attitude of that gentleman, his behavior in reference to all of it, indicates very clearly, at least to me, that in truth and in fact he did not care whether that epithet "liar" or "lying" was true or untrue. As Mr. Agoglia said, he had a story and he pushed ahead with it. And we feel and we urge on you that the manner in which he did so, reckless, reckless.

As to Audubon, what did they do? Well, of course, unlike the New York Times defendant, Audubon is a protagonist, which means they are on the opposite side of this great controversy, the controversy that you are not being asked to decide, the controversy that's all over, DDT.

But this particular part of the controversy dealt with bird counts. The Audubon people were quite upset with these people in the courtroom here because they were using the Audubon Christmas Bird Counts that seemed to indicate something that was contrary to the Audubon party line. That's the truth in fact of it, and it shows very clearly in the exhibits.

So, somehow or other a foreword is written, and I always find myself, after these months and years of litigation, I still find myself shocked when I think of the man sitting there and saying that, "I wrote the editorial, the foreword, I put this language in here, 'We are well aware,'", and so forth, all the way down to here, "being paid to lie, or parroting something he knows little about."

Then when you examine it closely and you hear how this happened, he says, "Well, these last eight words were not here. There was a period. Is being paid to lie, period, and that's how I had it in manufscript, and I took it to Mr. Clement, and Mr. Clement suggested the addition of this, or he added it himself, or whatever happened."

But just think of what that means from the point of view of Mr. Arbib. Think of the final eight words. Who was parroting something he knew little about?

Mr. Arbib testified that when this was written, he had not heard of three of the people that ultimately it turned out he was talking about. Mr. Arbib testified that he had not heard of Dr. Spencer, of Dr. Edwards or Dr. White-Stevens. He testified that he heard of Norman Borlaug. He knew him as a Nobel Prize winner.

Incompetent, said Mr. Clement this morning.

He had heard of Tom Jukes, Dr. Thomas Jukes, because he had a kind of vague recollection that he had some material printed on the op-ed page of the Times, distinguished scientist, scholar and prominent man of science, that is.

But at the time he wrote this foreword and took it to his boss with the period after the word "liar," he didn't even have Borlaug or Jukes in mind. He had nobody in mind. So this sardonic, ironic development here, that the language that they chose to add was apparently something they knew little about.

Who is doing that parroting? Does that show recklessness? I think so. I think so.

Then the famous series of phone calls. Oh, my, we have heard a lot about these phone calls, phone calls between Mr. Devlin of the New York Times and Mr. Arbib. Each have their own version. I am talking about Audubon.

Let's look at Mr. Arbib's version. What does he say? He says, "I warned," in effect, "Devlin that we were not calling anyone liars." He had a concern about that.

Well, at that time and place, there had been no article published, no person in the world could be smart enough to know that at least ten days and perhaps more later that this article with this headline would be published.

We know, too, as Mr. Agoglia pointed out, that although this article is dated August 14th, the telephone calling began as early as and perhaps earlier than August 4th, ten days before the date of publication.

So, Mr. Arbib says, based upon not this, that didn't come into being for at least ten days, but based upon this, the foreword, Mr. Arbib says -- his version of it is, "We are not calling these people liars." He feels it is very important that you believe that he said that.

Then he was astonished to hear my opposing counsel and colleague argue about the duty. Certainly Audubon has a duty. That's what we are doing here, because they have themselves betrayed that duty, that great, noble and lofty organization has done something it should not have done.

The second element as to the Audubon Society we feel we would like to call very much to your attention is what happened when Mr. Clement was on the stand. These exhibits, some of them originated with Mr. Clement.

As a matter of fact, the testimony is that when the names of these people came into the picture some time on August 4th or before, they were started by the publication that Mr. Clement was working on called, "The Pesticide Controversy." You will see that in the jury room.

As you look at it, on the first page thereof, that is after you open the booklet, on the first page thereof appeared the names of these people.

So he gave that to Mr. Arbib, and with or without the admonition, those names were transmitted to Devlin.

As you look at that exhibit, "The Pesticide Controversy," that Mr. Agoglia has asked you to read carefully, as you look at it, and as you remember the testimony of Mr. Clement this morning, my, oh, my, salty language: Paranoia -- I am not going to repeat it. I am not denying my shock, but we don't need that in the courtroom.

It must be in your recollection what the man said on the witness stand this morning. I believe you are entitled to appraise the likelihood of his being in the slightest bit squeamish about calling people liars. Independently, you are entitled to know that Mr. Clement does not hesitate to use strong language approaching that of the epithet.

As Mr. Agoglia argued, and I won't prolong it, Jack Devlin's punchy piece on the Christmas Count, and then he complains a little bit that the story was not straight, as Mr. Abrams argued, I should say, the story was not straight, but, the meaning of this phrase must be clear to all of us, "nor do we like to call people liars," but the date of this is August 14, 1972, the same day the libel appeared in the New York Times.

He couldn't wait to exult, to endorse. He had won a victory. As he said from the stand this morning, of course they didn't publish it, which they did not, for reasons, of course, that have not come into this case and have no -- we don't know why not, is simply the fact.

Turning, if I may, to cover a few of the points, and I might explain that since I am opposing as plaintiff two sets of defendants, the Court has been kind enough to permit me a few more minutes with you, because I have two people to meet rather than one, I want to point out just a few little odd factors and comment upon them, things that have occurred here since last Thursday.

Philip Marvin, Mr. Marvin came and testified as to the Christmas Bird Count and the reasonable reliance on that Christmas Bird Count by my clients.

When he testified as to what had turned his attention to this back in the early Sixties and he spoke about his experience back in Kansas, that was not what he was reporting.

He was reporting to you that that's what got him interested and as a statistician, he collected the data from the Audubon publications, put them together, and published them. You have the publications, so don't think that we presented Mr. Marvin simply to tell what he saw out his window. I agree that would be ridiculous. It would be ridiculous for anyone to.

But the gentleman was explaining how come he got interested. His work product is in front of you. His work product is scoffed at by Audubon. Audubon does not agree with that work product. They didn't question him very much about it.

The Christmas Bird Count. You haven't heard a work of evidence about any payment. These people are accused of being paid liars in the language with which you will read. No word about payment.

Two of the three at one time had been employed by chemical companies, one chemical company that had nothing to do with DDT, American Cyanamid. The evidence in the record shows that American Cyanamid never produced a single trace of DDT.

So what ? To work in a commercial laboratory is a very fine thing for a scientist. It doesn't taint him or disqualify him. But long before this litigation started, those two were in the academic world where their laboratory work continues.

And, of course, the third, Dr. Edwards, he has not worked for a chemical company. So there is not a word of evidence in this record, in spite of all this epithetical language,about paid liars.

This story, as one of my -- I think Mr. Agoglia pointed out, was not hot, fast-breaking, hard news. It was not a story that had any time sensitivity. It wasn't a matter of getting it on the 14th or the news value diminishes. That story could have been printed a week, two weeks later, and it would have had the same impact.

Mr. Devlin again -- he comes from the City Desk, remember? Remember him talking about being in the battery with the phones and taking the stories as they come in? His behavior with Mr. Arbib shows that he knows about questions and he knows about answers. Indeed, a man with 25 years of reportorial experience on the New York Times probably has more to do with questions and answers in his lifetime than a whole firm of lawyers. So Mr. Devlin knows about questions and knows about answers.

This case does not involve a contest as to who are the experts. We don't laugh at anyone. We don't criticize anyone. This case has to do with a libel, it has to do with motive, it has to do with the presence of malice, it has to do with the presence of disregard.

As I said to you in the beginning, it has been a troublesome case for me, not because of its complexity and not because of the clash of arms in opposing witnesses and facts, because that's commonplace.

It has been challenging for me because I have not really known how to bring the enormity of this offense to you. These people don't come in here on crutches as if from an accident. They don't come in here with bandages, but they do come in here wounded. They do come in here wounded.

Dr. White-Stevens said that he had a call from his son down in Texas. Conversation? Sure. "Hey, Dad, what's this about lying in the New York Times? All my friends around here think it is me."

Gee, I will bet Dr. White-Stevens would have paid a pretty penny to have never gotten that phone call. He had another one, too, from his other boy in the Midwest.

Of course, a university professor, a scholar, is subject to peer group discipline, that his other scholars and other university professors, and so forth, they look, evaluate and appraise.

Professor Jukes said that his first news about this came from one of his students. How humiliating. You know, Dr. Gordon Edwards couldn't be reached, as I say, because he was up there in the field at Glacier National Park up in the Northwest part of the nation. He was on August 14th just not around. He was out on one of his outdoor scientific expeditions. He had an appointment with his wife and daughter.

You remember the testimony. He came down across the road and went to the ranger's cabin, and right with his wife and daughter, he gets the news from a ranger, "Hey, what's this I hear about you being a liar in the New York Times?"

My, I bet he would pay a pretty penny not to have that happen. It is something you don't forget. It is a distinction that doesn't come to many people.

Mr. Freedman we brought in from the New York Times to tell us something about the nature and extent and permanence of the injury. He told us about the circulation of the New York Times on that day, 962,870, 962,870-odd, of which over 12,000 was to foreign countries, 93 of them, and he told us about how this story makes its way into an index and how the index is kept to provide scholars access to the microfilm copies kept by libraries and research institutions.

There probably are few papers in the world that have as much permanence as the New York Times. Sure, there are copies used to start fires or wrap garbage, but it is one of the few papers that is treasured by librarians, scholars, and as Mr. Maurice Freedman said of the New Yokr Public Library System, as he said from this stand, it would be inconceivable for an accredited institution not to have a file of New York Times.

Then, of course, there is the data bank, computer terminals, and he talked about how he had gone to the computer terminal that's available to him and taped into the data bank, and the same information came out.

You know, that was the first time I heard the word "microfiche," and it is a kind of strange word, a microfiche. Of course, as he explained the meaning, it is like -- this is two ways the Times has of making themselves a permanent record. One is on the microfilm, according to his testimony, and the material that comes out of the computer, it is pretty much the same, but they call that microfiche to distinguish it. This litigation has provided me with an opportunity to learn that little fact.

Damages. Ben Franklin, I think it was, said, "China, glass and reputation, once cracked, are not easily mended." A long time ago. Of course, Ben Franklin lived around the time of our American Revolution.

This opportunity for these gentlemen to come to you, bringing the most vigorous of defense in the middle of a very traumatizing set of public controversies, and to ask you for their measure of justice, I am proud of them. They are carrying forward an American tradition of dissent. Right or wrong, we do need the language of dissent, often in biting and critical terms, perhaps, but it is an indispensible thing.

What has happened? Well, Mr. Yannacone -- and, as you know, I examined him as a hostile witness, the Judge permitted me to do it -- he said that Mr. Clement of Audubon and himself and that other gentleman whom you heard on the stand were founders and were together during the early years until 1969. That was his testimony.

He said that during that time that they had devised a plan, a technique, a modus operandi, to destroy a scientist's credibility. If anything would destroy a scientist's credibility in his own peer group, it would be something like this. There is not many of them that can boast of that happening.

The case deals ultimately with issues, as the Judge will explain. Under our system, these are jury questions. The right of trial by jury is written into the Constitution. But, you know, one way of fixing this in your mind as to what this unique experience and event and what your role is all about is to try to remember in the long and troubled history of man's climb from the savage, what he has been striving for is his personal dignity, his personal worth; in other words, his integrity, his reputation for integrity.

As you look at the story of wars, revolts, revolutions, the fight upward from oppression, that is the motivating force. It is a priceless, precious and most valued thing that we are trying to defend and protect. Intangible, yes, but very real.

I remind you in conclusion, I remind you that we are really here as a nation, because a couple of centuries ago, two centuries to the day next July 4th, less than thirty days to go, we had about fifty-seven individuals who took a chance, and they joined in a revolt against the Government, and they met together in Philadelphia and they signed a document called the Declaration of Independence, and they were taking a chance because if they lost, there is no question they would have been hanged, because what they were doing from the point of view of the British Government was treason.

What did they do? They wrote and signed a classic and immortal document that we called the Declaration of Independence. I thought that I could share with you the final words from the Declaration, and the next time you run across it, the next time you see it on display in a museum or on someone's wall or in a public building, I urge you to read the words that concludes their covenant and compact among themselves:

"And for the support of this Declaration with the firm reliance on the protection of divine providence, we mutually pledge to each other our lives, our fortunes and our sacred honors."

The honor of these gentlemen is now in your hands, and I know you will serve them well.

Thank you.

THE COURT: Ladies and gentlemen of the jury, that concludes the summations. I will charge you tomorrow morning at ten o'clock. Please be here promptly.

Thank you.

(Jury excused)

(Court adjourned to Thursday, June 9, 1976, at 10:00 a.m.)

meesb

J. GORDON EDWARDS, et al

vs. 73 Civ. 3153

THE NATIONAL AUDUBON SOCIETY,
INC., et al.

June 9, 1976
10:00 a.m.

(In the robing room.)

THE COURT: I understand, Mr. Abrams, you have objections to present.

MR. ABRAMS: Yes, your Honor.

First, I understand from your Honor's prior rulings that your Honor will be instructing the jury that the statement -- that the August 14, 1972 article in the New York Times is libelous per se.

THE COURT: That's right.

MR. ABRAMS: In light of that ruling, we think that to phrase the question to put to the jury in the form that you have, "Was Edwards libeled?" is confusing to the jury and prejudicial, from our point of view, at least without reference to the actual malice issue which is going to be central to the --

THE COURT: I think after they hear my charge, they will know what I am talking about.

What is your next point?

MR. ABRAMS: My second point is Question C, which reads, "If yes, what amount do you award as compensatory damages?"

I think that should read, "What amount, if any, do you award as compensatory damages?"

THE COURT: No, I am saying there is a presumed damage here under New York law and they can give a dollar if they wish to. Therefore, it could be $1.

MR. TROWBRIDGE: Are you saying that in the charge?

THE COURT: Yes.

MR. TROWBRIDGE: I would have the same feeling about the use of the word "libel" in view of your Honor's indication as to libel per se. So I would --

THE COURT: Well, I charge the jury the four elements and they have to find the four elements to find he was liable.

If the answer is no, that is the end of the case. If the answer is yes, you go on to damages and I say in my charge, if you reach this point, then you go on to damages. I think it will be clear in relation to the charge.

Okay.

MR. ROTHWELL: Thank you, your Honor.

MR. ABRAMS: Thank you, your Honor.

(In open court, jury present.)

CHARGE OF THE COURT

THE COURT: Miss Harvill, ladies and gentlemen of the jury:

We have now reached the point in this trial where you are about to enter upon your final function as jurors, which is, of course, one of the most sacred duties of citizenship.

You have given careful attention to the evidence during the course of the trial and I am certain that you will conduct your deliberations in the same fine spirit that you have so far displayed, and with impartiality and fairness reach a just verdict in this case.

In our court system, the functions of the Judge and the functions of the jury are clearly defined. It is my duty to instruct you as to what the law is; it is your duty to accept the law as I explain it to you. Just as I am the judge of the law, so you are the exclusive judges of the facts. You alone determine the credibility of the witnesses, and the weight and effect to be given to the evidence. It is up to you to determine what the facts are from the evidence in this case, and from those facts decide whether the plaintiffs have sustained their burden of proof on the claims which they have presented against the defendants.

This trial has been a short one and you have just heard the summations of counsel yesterday afternoon in which they pointed out the various portions of the proof on which they say you should rely to render a verdict in favor of their clients. I see no reason to further detail the contentions of the parties or the specific proof to substantiate those contentions.

In determining the issues in this case, it is your recollection of the testimony that is to control and not that of counsel.

Statements made by counsel in argument on the admissibility of proposed evidence and colloquies between the Court and counsel with respect to admission or rejection of such evidence are not evidence and are not to be considered by you in your deliberations. The summations of counsel which you have just heard are not to be considered as evidence, but only as arguments to you as to what counsel feel you should find from the evidence.

During the course of the trial, I had occasion to admonish counsel. Sometimes lawyers, in the zeal of advocacy, make statements which in calmer moments they would or should not have made. Such instances must play no part in your deliberations. Personalities of counsel are not in issue and neither is that of the Court.

If, during the course of this trial, I sustained an objection by one counsel to a question asked by the examining counsel, you are to disregard the question and any alleged facts contained in the question. If a question has been asked and an answer given by the witness, and I have then stricken the answer from the record, you are to disregard both the question and the answer in your deliberations. The only evidence you can consider is sworn testimony and documents admitted in evidence.

Originally, plaintiffs Edwards, Jukes and White-Stevens sought damages against defendants Audubon Society, Arbib, Clement, Stahr, and the New York Times, for three alleged libels published by the defendants. As the result of my rulings on motions which involve matters of law and do not concern you, the claim that the Foreword appearing in the April 1972 issue of American Birds is libelous has been withdrawn from your consideration.

Furthermore, any claim for damages against defendant Stahr has also been withdrawn in your consideration.

These dispositions should not be considered or discussed by you or influence you in any way in passing upon whether the two remaining claims of libel have been proven. I should point out that while you will not consider the Foreword as being the basis for a separate claim for damages, it may be considered by you in conjunction with all the other evidence in your deliberations on the two alleged libels which you will consider.

The first alleged libel is the New York Times news article of August 14, 1972, which is Exhibit 1.

The second is the letter from the Audubon Society to the Editor of the New York Times, dated August 14, 1972, and is Exhibit 3.

As to the latter communication, damages are sought only against the defendant National Audubon Society and the individual defendants Arbib and Clement. Damages are sought against these defendants and defendant New York Times for the alleged libel contained in the news article.

In order to determine liability in this case, you will have to find, as to each defendant in each claim in which he or it is named, whether that defendant has libeled any of the plaintiffs. To make your job easier, I will give you a list of questions to answer before you retire to deliberate the issues before you. This list of questions will set forth each of the findings you must make after discussing the evidence and the applicable law which I will now give to you.

A libel is a writing which tends to disgrace or discredit a person in the community. In order to prevail in this action, each plaintiff must first prove the following three elements by a fair preponderance of the evidence:

1. That the statement made refers to the plaintiff.

2. That the statement is defamatory.

3. That the statement is false.

If you find that a plaintiff has sustained his burden of proof as to these three elements, you must further find that such a plaintiff has proven by clear and convincing evidence that the statements were published by a defendant with "actual malice."

Now, a fair preponderance of the evidence is no more than the greater weight of the evidence, and this weight is determined by the quality rather than the quantity of the evidence. It has nothing to do with the number of witnesses called to testify on behalf of any party. If the evidence as to the liability of a defendant is evenly balanced, then a plaintiff has not sustained his burden of proof as to that defendant and your verdict must be for that defendant.

As to the fourth element, "actual malice," I have said that a plaintiff must establish this by clear and convincing evidence. This means that you must be convinced not only that the greater weight of the evidence points to the existence of actual malice on the part of the defendant, but that such evidence is clear and convincing in its probative effect.

Now, let us consider the four elements of libel in more detail.

The first element, which you must find by a fair preponderance of the evidence, is that the alleged libel refers to the plaintiff. As each of the plaintiffs is named in the New York Times article and the letter, I instruct you that as to these two claims, the first element has been satisfied.

The second element that must be proven by a fair preponderance of the evidence is that the statement made is defamatory. I charge you, as a matter of law, that to call someone a liar, or professionally irresponsible with respect to his professional credentials, duties or opinions, is defamatory, and therefore, you will find that the news article and the letter are defamatory, and that this element is also satisfied.

The third element that must be proven by a fair preponderance of the evidence is that the claimed libels are in fact false. The gist of the claimed libels here is that the plaintiffs were paid liars when they assertedly stated that the Audubon Bird Counts indicated an increasing bird population, or that the plaintiffs were parroting something they knew little about. Plaintiffs must show that the statements were false as used in the ordinary sense of "untrue."

The final element that must be proven is that the claimed libels were published with what the law terms "actual malice." I should tell you the word "publish," as used in this sense, includes the letter of August 14, 1972 from the Audubon Society to the New York Times.

"Actual malice" has nothing to do with ill-will or malice as these words are commonly used. They are words of art in this libel action. They mean that the publication was made either with actual knowledge at the time of the publication that it was false, or with reckless disregard of whether it was false or not.

By reckless disregard of the truth is meant the making of a false statement when a defendant entertains serious doubts as to the truth of the publication. Reckless disregard refers to the truth or falsity of the facts contained in either statement. It does not refer to whether Devlin accurately reported the information he obtained from Arbib.

Neither negligence nor failure to investigate, on the one hand, nor ill-will, bias or prejudice,on the other, standing alone, are sufficient to establish either a knowledge of the falsity of or a reckless disregard of the truth or falsity of the materials used.

However, in determining whether there was a reckless disregard of the truth or falsity of the facts contained in this statement, you may consider all the evidence in this case and the fair inferences to be drawn from such evidence, bearing on the intent and the motives of the defendants, the investigations made or not made to ascertain the truth under the circumstances of this case, and the lack of the pressing nature of the material, since the news article was not "hot news," and there was ample time to investigate.

The heat of the controversy over the advantages or disadvantages of DDT would not excuse a defendant for following the course of conduct which you find to be a reckless disregard of the truth, although it may have some impact on the amount of punitive damages you may grant a plaintiff if you reach that point in your deliberations.

Now, if you find as to a plaintiff that all four elements exist under the guidelines I have given you, then you would find for that plaintiff against any defendant whom you have found to have acted with actual malice in publishing the article or letter, or in supplying the information deemed to be libelous in such statements.

I should point out to you that the National Audubon Society and the New York Times are both corporations, and, as such, are responsible for the acts of their officers and employees done within the scope of their employment. Thus, the Times is responsible for the actions of Mr. Devlin with respect to the Times article. Likewise, the Audubon Society is responsible for the actions of Arbib and Clement performed within their responsibilities as officers of the National Audubon Society.

If you find liability on the part of one or more of the defendants as to one or more of the plaintiffs, then and then only will you consider the amount of damages to be awarded for such injury. The law allows two different types of damages to be awarded: Compensatory damages and punitive damages.

Compensatory damages in this case are sought because of a claimed impairment of reputation and standing in the community, personal humiliation and mental suffering that has been caused by the publication of a libel. You may, if you wish, infer that the publication of the libel itself affected the reputation of the plaintiff in the community.

In determining the amount of such damages, the law, insofar as possible, attempts to award a just and fair compensation for a loss which directly and naturally flows from a wrong done by a defendant to a plaintiff. The damages awarded must be purely compensatory and neither inadequate nor excessive. Obviously, any amount to be awarded for mental suffering, or for loss of reputation cannot be determined with mathematical certainty or precision, but should bear some relationship to the injuries suffered.

In weighing this item of damage in connection with the publication of the Times news article, you may consider the circulation of that paper of over 900,000 copies on August 14, 1972, and the extended life of the article in libraries and data banks. Insofar as the letter is concerned, it was sent to the Editor of the New York Times, and as far as we know, was seen only by some employees of that newspaper.

In this case, if you find liability, but find no general damages for which the plaintiff should be compensated, you will award that plantiff $1.00 in nominal damages.

In addition to compensatory damages, you may, but are not required, to award punitive damages to a plaintiff whom you find has been libeled by one or more of the defendants. Punitive damages are awarded for the purpose of punishing a wrong-doer for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

Punitive damages may be awarded only if you find by a fair preponderance of the evidence that a defendant published the libel with malicious intent, that is, with a desire to harm the plaintiff, or that the defendant published the libel so recklessly as to indicate a heedless disregard for the rights of a plaintiff.

The amount of punitive damages, if awarded, must be fixed with what the law calls "calm discretion and sound reason," and must never be awarded or fixed in amount because of any sympathy or bias for a plaintiff, or prejudice against any defendant, or any person in the position of such a defendant.

In your search for the truth, you must use plain everyday common sense. You must not be governed by bias, sympathy or prejudice. You have seen the witnesses on the stand and observed their manner of giving testimony. How did they impress you? Did they appear to be testifying frankly and candidly?

In determining what degree of credit you should give a witness' testimony, you may consider his conduct, his manner of testifying, and his interest in the outcome of the litigation. The plaintiffs and defendants, of course, are interested witnesses. Employees of the defendant corporations are interested witnesses. You may consider that fact in determining the weight and credibility to be given to their testimony.

However, it does not necessarily follow that, merely because a person is interested in the result, he is not capable of telling a truthful version of an occurrence.

If you believe that a witness willfully testified falsely as to any material fact, you may disregard his testimony altogether or you may accept such portion of his testimony as you believe worthy of credence. What you accept or reject as credible evidence is for you to determine, but you may not go outside the evidence to speculate as to the facts.

You will recall that the defendants Arbib and Clement were asked about statements which they made under oath prior to trial. An inconsistent statement made by a party under these circumstances may be considered by you as affirmative proof of the facts contained therein, as well as impeaching his credibility on this trial.

Devlin was also questioned about statements which he made under oath prior to trial. Any such inconsistent statement may be considered by you solely as impeaching his credibility on this trial unless he has also affirmed the truth of the prior statement, in which event it may be considered as affirmative proof of the facts contained therein.

Inconsistencies and contradictions appearing in the testimony may or may not be explainable. So, too, they may be willful or inadvertent, deliberate or innocent, major or minor. It is for you to appraise the significance of any inconsistencies and contradictions in relation to the credibility of a witness.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence -- such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, that is, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

Circumstantial evidence is the proof of facts from which a fact in issue may reasonably be inferred. You may draw such inferences as reason and common sense lead you to draw from facts which you find to have been proven.

Circumstantial evidence is not on any different or lower plane than direct evidence. No greater degree of certainty is required of circumstantial evidence.

You have heard the testimony of experts called on behalf of the plaintiffs and the defendants. How do you, as laymen, determine the facts from expert testimony? You are to act in exactly the same way that you would appraise and determine the credibility of an ordinary witness, as I have outlined to you.

Ordinary witnesses are allowed to tell you what they see, hear or experience. Experts, such as the scientists who were called, are permitted also to tell you their opinions by reason of their training and knowledge in their particular fields.

As you well know, an opinion is something a witness forms in his own mind based on specific facts from which, using his judgment, training and experience he draws certain conclusions. Of course, if you don't believe the facts which form the basis of the expert's opinion, then his opinion is valueless, but, otherwise, you will treat an expert's opinion as evidence which you have heard.

You may accept his opinion or you may reject it, in whole or in part, and it is entirely up to you as to what you will do with his testimony and what credibility you will give to it.

I have sought to avoid any comments which might suggest that I have personal views on the evidence. I have no views as to the facts of this case, and you are not to assume that I have any such views. This charge is given to you solely to instruct you as to the law applicable to the case.

The actions of the Judge during the course of the trial in ruling upon motions or objections by counsel or in statements to counsel, or in attempting to clearly set forth the law in these instructions, are not to be taken by you as any indication of any determination of the issues of fact. These matters, the actions of the Court, relate to procedure and law. You and you alone determine the facts.

There are six members of this jury and all of you must agree upon a verdict. If you should desire any of the exhibits, they will be sent to the jury room upon your request. If you want any of the testimony or any portion of this charge read, that can also be done upon your request.

This case is obviously an important one to the plaintiffs. It is equally important to the defendants. I am submitting it to you in complete confidence that you will comply with your oath as jurors and decide this case fairly and impartially, and without fear or favor.

If there are any exceptions to the charge, I will take them in the robing room.

(In the robing room.)

THE COURT: Mr. Rothwell?

MR. ROTHWELL: No exceptions, your Honor.

THE COURT: Mr. Abrams?

MR. ABRAMS: I would like to make exceptions of two sorts, one is to the inclusion of certain phrases in your charge and the second is to the exclusion of certain proposed charges that we have made to you.

THE COURT: You have already made your objections to the rulings on the evidence.

MR. ABRAMS: If --

THE COURT: You except to all my rulings which do not accept your requests to charge.

MR. ABRAMS: Fine, as long as that is understood, I will not burden you with that.

With respect to what you did charge today, I would make the following points:

One, your Honor instructed the jury that actual malice had nothing to do with ill-will and you then instructed the jury as to what actual malice was. It is our position that if there is no ill-will, then it is relevant to a determination of actual malice and the jury should have been so charged.

Second, your Honor in your charge as to

recklessness said something to the effect that the charge of recklessness does not refer to whether the Times reporter accurately reported what he was told. We except to that charge. It is our view that the law is if he did report properly that the Times cannot be held liable on these facts.

Third, the Court made reference to the fact that this was not "hot news" and we except to that charge in the context of this case.

Fourth, the Court used the pharse, "The amount of punitive damages you award if you reach that issue," and I think that that should have been phrase, "The amount of punitive damages,if any, you award...."

Fifth, your Honor in dealing with humiliation, mental suffering, loss of reputation, said that they may be presumed. It is our position that there has been no proof as to these things and they may not be presumed. That is mentioned in our request to charge but --

THE COURT: The Buckley case said it, though.

MR. ABRAMS: I believe it is wrong. It is towards the bottom of the charge for a different point.

THE COURT: Okay.

MR. ABRAMS: It is our view that the issue of amounts to be awarded for mental suffering, humiliation, should not have gone to the jury.

Next, the Court made reference to the extended life of the article, and the life of the article is not relevant to damages.

And, finally, with respect to punitive damages, the Court having instructed the jury such damages may only be awarded if the material was printed with a desire to harm the parties who are suing or so recklessly as to indicate heedless disregard of the plaintiffs' rights, we believe the Court with that test having been set forth should have instructed the jury that there is no basis for the award of punitive damages on the facts of this case.

MR. TROWBRIDGE: Your Honor, I take it I also have an exception to the --

THE COURT: You have an exception to my denial of granting every request you made of me in the requests to charge.

MR. TROWBRIDGE: Thank you. I would also like to join with Mr. Abrams' exceptions as far as they affect Audubon without repeating them.

We further except, your Honor, to the direction by the Court to the jury as regards the Audubon defendants; both the newspaper article and the letter of Mr. Clement of August 14th were defamatory and that that element has been satisfied.

It is an issue of fact in this case whether Audubon either in the letter or in the Arbib-Devlin conversation called the defendants "liars." We suggest that that is a question that the jury should be permitted to consider.

Mr. Arbib testified that he particularly demonstrated to Mr. Devlin not to call them liars in the article. I don't believe the jury has that in their minds as an issue in the case right now.

Furthermore, Mr. Clement testified with respect to the sentence in the August 14, 1972 letter that he was not calling these people liars in that letter.

Now, that is something with which you may agree or disagree, but we think the jury should be told to take that letter as a whole with all the other evidence in the case including the fact that that very day the newspaper, the New York Times, said in a headline that we had called them liars.

So, we except to the direction that we have defamed these people.

Furthermore, if we did defame them, it is possible that we did so by accusing them of what I suggest is a single incidence of incompetence, namely, we have never said they were not good entomologists --

THE COURT: No, you just said they were paid liars.

MR. TROWBRIDGE: We say we didn't say that and we say it is for the jury to decide.

THE COURT: That is what your article says.

MR. TROWBRIDGE: Unnamed people are either paid liars or don't know what they are talking about.

THE COURT: You also said they were paid liars. I see no point to further discuss it.

MR. TROWBRIDGE: Let me just make one point:

I would like an instruction, your Honor -- I would like to ask for one, that if they were accused of incompetency on a single point, which they say this is, namely, the use of these brid counts, that that is not defamatory.

Furthermore, we think there should be some direction to the jury to the effect that the Audubon Society, Mr. Arbib, cannot be held for what is in the New York Times unless that was substantially accurately a report of what he said.

Now, at this point, I think the jury has in mind that Arbib is almost a co-author of the Times article.

THE COURT: I don't think so. You certainly didn't make that point in your summation. You said just the opposite in your summation. That is the whole purpose of the summation, to direct the jury to the testimony to find your position.

Now if the jury believes that Arbib put such a qualification on the statement of the Times, I assume that you might be let out of what is known as the first libel. But if they don't believe you and they believe Devlin, you are in.

That is the issue for the jury, and I am sure they understand it because both Mr. Agoglia and Mr. Abrams made that perfectly clear to the jury. That is why I saw no need to put the evidence together in this case, and --

MR. TROWBRIDGE: I say more than that, your Honor. I say Devlin's testimony is acceptable. It is simply that these other men referred to the article. He never said Arbib said these are the liars.

THE COURT: He said, "I am interested in the sentence that you called people liars. Who are they, because I don't want to malign other people."

He wasn't worried about misuse. He was worried about -- Devlin -- as Agoglia pointed out in his summation -- wants to sell newspapers. What sells newspapers is calling a person a liar. You don't sell newspapers by misuse of data.

That is what he was looking for. That is what he said he was looking for, and if the jury believes that that is what he was looking for, then the jury is entitled to believe that when he was given the names he was given the names of the alleged liars. If they believe the story. That is the issue for the jury.

I don't like to summarize. If I summarize this testimony, I would say Clement wants it both ways. He wants to call him a liar but at the same time, he does not want to be subject to a libel suit. That is my attitude about Mr. Clement.

MR. TROWBRIDGE: I observed that.

THE COURT: But I am not going to say that to the jury, although I think I have a right under the federal rules to make that comment. But I am not.

MR. ABRAMS: I would like to make a final comment, if I may, your Honor.

I think this is preserved by my requests to charge but I do want the record to reflect that we do except to your Honor's charge to the jury that the New York Times article was libelous, per se.

THE COURT: Sure. Okay.

Anything else?

What I am going to do is I am going to tell the jurors that we will have lunch brought in. It is awfully hot out and they can sit in a cool room and deliberate. I will have lunch brought in about a quarter of one so we will be in recess from quarter to one to two o'clock.

(In open court)

(Marshal sworn.)

THE COURT: Miss Colville, at this time you leave us. Unfortunately, you don't join in the deliberations. So, if you have anything in the -- you do have something?

MISS COLVILLE: Yes.

THE COURT: Would you get it first.

Thank you. Would you report back to Room 109.

(Alternate juror excused.)

THE COURT: Give Miss Harvill the questions.

Ladies and gentlemen of the jury, I have directed that lunch be brought in for you. The marshal will come in with a menu. You can pick out your lunch. It is kind of warm outside and I think it is cool in the jury room so you can stay there and have your lunch. It will be brought in about a quarter to one but the marshal should be in in the next fifteen, twenty minutes to get your orders.

I think you can now retire to the jury room.

Thank you.

(The jury retired to deliberate at 10:55 a.m.)

THE COURT: I will assume, if any requests are made by the jurors for exhibits, you can agree among yourselves as to what you will send in. I don't have to come down and bring the jury back in.

MR. AGOGLIA: I agree.

Your Honor, may we take a half-moment of your time.

Counsel for defendants thought that perhaps in your own fashion, you could at least indicate to the jury that if they have a verdict before a quarter of one, they need not wait.

As I heard it --

THE COURT: They don't have to be told that. My jury last week did exactly that. They went out at quarter to twelve. They were told they were going to have lunch and they came back at quarter after twelve and didn't eat the lunch. You paid for it.

(Recess)

FA

(Jury's requests for exhibits marked Court's Exhibits 1 and 2 for identification.)

(At 2:50 p.m., the following note was received from the jury:

"We would like to hear:

"1. Devlin's testimony regarding conversation over phone with Arbib.

"2. Arbib's testimony regarding his conversation with Mr. Devlin?

"E. Harvill, Forelady.

"P.S. Could we have more envelopes.")

(Note from jury marked Court Exhibit 3 for identification.)

THE COURT: Have you gentlemen agreed on what should go in?

MR. ABRAMS: Your Honor, we are just on the verge of reaching agreement. We just received these really five minutes ago, the transcript of Mr. Arbib of yesterday.

THE COURT: All right, go ahead.

(Pause)

MR. ABRAMS: I have only one disagreement, your Honor.

THE COURT: What page?

MR. ABRAMS: 480, line 5 through 481, line 15.

Since I am the one seeking its reading, I will tell the Court the reason I think it is relevant is the material on 481.

THE COURT: Just a second. Let me get the feel of it.

(Pause)

THE COURT: What line do you want?

MR. ABRAMS: I think lines 10 through 15 on 481 are responsive to the jury's request and I think are incomprehensible without reading to the jury what that content is without Mr. Arbib saying, "That's correct."

MR. AGOGLIA: Your Honor, I am a dissenter.

THE COURT: Do you mind if I read it? Then I will be able to rule on it.

MR. AGOGLIA: I'm sorry.

THE COURT: I don't think it is part of the jury's request, Mr. Abrams. This is Mr. Clement's view of what he thought took place.

MR. ABRAMS: This is Mr. Arbib commenting.

THE COURT: It is not the conversation. You are looking for what the conversation was. This does not bear on what the conversation was. This is merely Clement thinking what the conversation was.

MR. ABRAMS: The other general question I will raise is whether your Honor thinks it is responsive to have material --

THE COURT: I don't think it is. I don't think it is responsive to the jury's request.

MR. ABRAMS: All right.

THE COURT: All right. Aside from that, have you agreed?

MR. ABRAMS: Aside from that, we are in agreement. I have the list of pages.

THE COURT: If you will bring it up to the court reporter, she will have it before her and she will read it.

(Testimony read to the jury by the reporter.)

THE COURT: The reading of the testimony is concluded.

You may retire now.

(At 4:00 p.m., the jury retired to continue their deliberations.)

(At 5:15 p.m., a note was received from the jury.)

(In the robing room)

THE COURT: I have received a note from the jury which reads as follows:

"To the Judge:

"1. We would like your guidance on what might be awarded in compensatory damages based on the experience of the Court.

"2. Do we decide what percentages of these damages are paid by whom?

"E. R. Horvill, Forelady."

I am prepared to send an answer back to them which would read:

"I'm sorry, but I cannot give you any guidance as to the Court's experience in awarding compensatory damages. This matter is solely within your province.

I will send an answer with respect to No. 2, reading as follows:

"As to compensatory damages, it should be a single figure."

MR. AGOGLIA: Could I hear the second question?

THE COURT: "De we decide what percentages of these damages are paid by whom?"

You are the joint tort feasors under the second claim or the first libel.

MR. AGOGLIA: Your Honor, I have to say something about the first libel vis-a-vis the second libel.

THE COURT: You have the questions. That is in the questions. Their question goes to compensatory damages.

MR. AGOGLIA: Yes, sir.

THE COURT: And it says, "Edwards, Jukes," and so forth. There is one figure on compensatory damages. They don't apportion it.

MR. AGOGLIA: I agree with that, your Honor. I just thought that perhaps the question was calling to that part of your Honor's charge where you said that because of the distribution of the Times vis-a-vis that letter of the 14th, which only went to the editorial people at the Times that --

THE COURT: That is submitted to them as separate questions.

You have the questions I gave to the jury.

MR. AGOGLIA: That is what I am saying to your Honor.

Okay. I do, your Honor. I know exactly what you are saying, and I agree. I thought they were trying to make some kind of a distinction that way, can they put one figure for the Time's libel or --

THE COURT: They may be deciding that if they have both sets of defendants in, do they apportion between the Audubon defendants and the Time's defendant, or do they apportion between Arbib and Clement -- but there is no apportionment. It is a single figure that a plaintiff against all defendants on the Time's article claim. You are joint tort feasors under that.

Similarly, under the second claim, Arbib and Clement and the Society are joint tort feasors. They get one figure.

Do you want to say something?

MR. ABRAMS: No. I know that would surprise you but --

THE COURT: It does surprise me.

I gather you have no objection to my sending this in as a note.

I find, my experience has been, when you call juries in, they ask questions, you give them answers, individuals start to get up and we get in the middle of a give-and-take back and forth, which I do not want to have happen.

But if you want them in, I will bring them in and tell them exactly what I am going to write here and immediately dismiss them.

MR. AGOGLIA: I have no objection to your Honor sending a note in.

MR. ABRAMS: Nor I.

MR. ROTHWELL: No objection, of course.

THE COURT: I will write it out.

(Pause)

MR. ABRAMS: Your Honor, if I may make a suggestion, I think it might be constructive if you read to the jury again that part of the charge which related to the question of compensatory damages.

THE COURT: Not unless they ask for it.

All right, I will read the exact wording of this:

"1. I cannot give you any guidance as to the Court's experience in what the amount should be in awarding compensatory damages. The amount awarded is solely within your discretion.

"2. You do not apportion among the defendants the amount of compensatory damages. The total awarded as the sheet indicates covers all defendants whom you have indicated are liable in your answer to B."

And B is yes or not.

MR. ABRAMS: I have only one suggestion, your Honor, and that is, the words "should be" in your first sentence ought to read "might be."

MR. AGOGLIA: "In accordance with my charge." Do you follow me,your Honor? Could you add there, "In accordance with my charge" without referring to it? In other words, I don't want them to think they can go off half-cocked on a theory of their own.

THE COURT: You want me to change "should" to "might"?

MR. ABRAMS: Yes.

THE COURT: That is the word they used.

MR. AGOGLIA: Could you add to what you are saying, "In accordance with my charge"?

THE COURT: I will not give it.

MR. AGOGLIA: Not the charge, your Honor, just add on it.

THE COURT: I will not add those words.

MR. AGOGLIA: It seems to me they might think they can do any darned thing they want.

THE COURT: They don't indicate they have any problem with the charge. It is perfectly obvious that the amount is left vague by the circumstances of this case and I have told them so, and I have told them they can't be excessive, nor insufficient.

It has to have some relation. They know that. They have not indicated they don't understand that.

MR. AGOGLIA: I just thought, as a reminder to them, that they just can't go half-cocked.

THE COURT: If they want to, they can, but there is a Court rule over it.

All right, take this back.

(Note handed to Marshal)

xxx (Note from jury marked Court Exhibit 4 for identification.)

(at 6:00 p.m., in the robing room.)

THE COURT: My usual practice in criminal cases as well as civil cases is to ask a jury around this time whether they can reach a verdict, and if they cannot, to tell them that I will let them go home and to come back tomorrow morning. I don't lock juries up.

We don't have facilities, decent facilities for eating any more since Gasner's went the way of all flesh, and the typical note that I send, I will read to you:

"If you do not believe that you will reach a verdict in this case by 6:30 p.m., I will permit you to go home and return tomorrow morning to continue deliberations."

Anybody have any objection?

MR. ROTHWELL: No objection.

Your Honor, what time would they return tomorrow?

THE COURT: Ten o'clock.

So, will you take this to the jury and we will sit around and we will wait. Just tell them to put down yes or no.

(At 6:10 p.m., note sent to jury.)

(Pause)

(At 6:12 p.m., a note was received from the jury.

THE COURT: "We have come to a decision."

Bring them in.

(Note from jury marked Court Exhibit 5 for identification.)

(At 6:15 p.m., the jury returned to the courtroom.)

THE CLERK: Ladies and gentlemen of the jury, I am about to take a roll call. Please answer as your name is called.

(Jury roll called - all present.)

THE CLERK: Madam Forelady, have you reached upon a verdict?

THE FORELADY: We have.

THE CLERK: As to the August 14, 1972 article in the New York Times, the answer was, "A, yes."

THE COURT: For who?

THE CLERK: For White-Stevens.

Answer to Question B, "If yes, which defendants," and the answer is no for Audubon, no for Mr. Arbib, yes for Mr. Clement, and yes for New York Times.

Question, "If yes, what amount do you award as compensatory damages?"

The amount is $20,000.

Question D, "If yes in B, what amount, if any, do you award as punitive damages?"

And the answer is none as to Mr. Clement and none as to New York Times.

As to Mr. Jukes, the answer to A is yes, B, as to National Audubon Society, the answer is no. Mr. Arbib, the answer is no. As to Mr. Clement, the answer is yes. As to New York Times, the answer is yes.

C, the award as to compensatory damages is $20,000.

And D, if the answer in B is yes, what amount, if any, and as to Mr. Clement, the answer is none, and the New York Times, the answer is none. As to Mr. Edwards, the answer is yes.

Question B, National Audubon Society, the answer is no. Mr. Arbib, the answer is no. As to Mr. Clement, the answer is yes. As to New York Times, the answer is yes.

Question C, what amount, compensatory damages, the amount is $21,000.

If Question in B, what amount, if any, do you award as punitive damages, as to Mr. Clement, none; New York Times, none.

As to the August 14th letter to the Editor of the New York Times, Mr. Edwards, the answer to A is yes; if the answer is yes, which defendants? National Audubon Society, no; Mr. Arbib, no; Mr. Clement, yes.

Answer to Question C, if yes, what amount do you award as compensatory damages? The amount is $1.

As to D, if yes in B, what amount, if any, do you award as punitive damages? Mr. Clement, none.

Mr. Jukes, the answer to A is yes; B, National Audubon Society, the answer is no. Mr. Arbib, the answer is no. Mr. Clement, the answer is yes.

As to Question C, if yes, what amount do you award as compensatory damages? The amount is $1. As to D, the answer is none as to Mr. Clement.

As to Mr. White-Stevens, the answer in A is yes; B, the National Audubon Society, the answer is no; Mr. Arbib, the answer is no; Mr. Clement, the answer is yes.

If yes, what amount as compensatory damages? The amount is $1. And as to Question D, as to Mr. Clement, none.

Ladies and gentlemen, so say you all?

THE FORELADY: So say we all.

THE COURT: Anybody wish the jury polled?

Mr. Abrams?

MR. ABRAMS: Yes, your Honor.

THE COURT: Poll the jury.

THE CLERK: Yes, your Honor.

Ladies and Gentlemen of the jury, you have heard your verdict as it now stands recorded and I ask you, is that your verdict?

(Each juror, upon being asked by the Clerk, "Is that your verdict?", answered in the affirmative.)

THE CLERK: And I would ask the Forelady to please sign this.

THE COURT: Yes, do that now.

They are individual verdicts so you ought to sign all of them.

Ladies and gentlemen of the jury, you have listened attentively to the testimony that was brought by all sides in this case. You have carefully deliberated the issues from eleven o'clock this morning to a quarter after six this evening, and that is what our jury system is all about, careful consideration of the evidence as adduced by all the parties and then voting after weighing all of the evidence.

You are excused with the thanks of the Court. The Clerk has your certificates of service and he will give them to you in the room in the back.

Thank you very much.

I see he has given them to Miss Harvill and she will give them to you right here.

(Jury excused.)

THE COURT: How much time do you want for motions, Mr. Abrams? Ten days?

MR. ABRAMS: I'm sorry, I couldn't -- I thought you wanted me to argue now. Ten days will be fine, yes, your Honor.

MR. TROWBRIDGE: Ten days, your Honor.

MR. AGOGLIA: Yes.

MR. COURT: Ten days for all motions, thank you very much.

(Court adjourned.)

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